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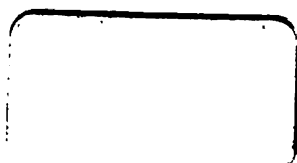
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A
SELECTION OF CASES
ON
THE CONFLICT OF LAWS

BY
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CASES ON THE CONFLICT OF LAWS.

PART III.

THE CREATION OF RIGHTS.

CHAPTER VI.

PERSONAL RIGHTS.

SECTION I.

GENERAL PRINCIPLES.

STORY ON THE CONFLICT OF LAWS (1884), §§ 18, 20, 21, 22, 23, 26, 35. — Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect, and bind directly, all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural born subjects or aliens; and also all contracts made, and acts done within it. A State may, therefore, regulate the manner and circumstances under which property, whether real or personal or in action, within it shall be held, transmitted, bequeathed, or transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts, and other acts, done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies, and modes of administering justice in all cases calling for the interposition of its tribunals to protect, vindicate, and secure the wholesome agency of its own laws within its own domains.

No State or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation that other nations should be at liberty to regulate either persons or things within its territories. It would be equivalent to a declaration that the sov-

ereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules, which none were bound to obey.

Although the laws of a nation have no direct binding force or effect, except upon persons within its territories, yet every nation has a right to bind its own subjects by its own laws in every other place. In one sense, this exception may be admitted to be correct, and well founded in the practice of nations; in another sense it is incorrect, or, at least, it requires qualification.

No nation is bound to respect the laws of another nation, made in regard to subjects who are non-residents. The obligatory force of such laws cannot extend beyond its own territories. And if such laws are incompatible with the laws of the country where they reside, or interfere with the duties which they owe to the country where they reside, they will be disregarded by the latter. Whatever may be the obligatory force of such laws upon such persons, if they should return to their native country, they can have none in other nations where they reside. They may give rise to personal relations between the sovereign and subjects, to be enforced in his own domains; but they do not rightfully extend to other nations. *Clauduntur territorio*. Nor, indeed, is there, strictly speaking, any difference in this respect whether such laws concern the persons or the property of native subjects. A State has just as much intrinsic right, and no more, to give to its own laws an extraterritorial force, as to the property of its subjects situated abroad, as it has in relation to the persons of its subjects domiciled abroad. That is, as sovereign laws, they have no obligation or power over either. When, therefore, we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws on the part of other nations. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory according to its own sovereign will and polity.

From these two maxims or propositions there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.

The jurists of continental Europe have with uncommon skill and acuteness endeavored to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labor, and whether their principles, if universally adopted, would be found either convenient or desirable under all circumstances.

The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which

arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return.

DICEY ON THE THE CONFLICT OF LAWS (1896), p 25. — The object for which courts exist is to give redress for the infringement of rights. No court intends to confer upon a plaintiff new rights, except in so far as new rights may be necessary to compensate for, or possibly to guard against, the infringement of an existing right. The basis of a plaintiff's claim is that, at the moment of his coming into court, he possesses some right, *e. g.*, a right to the payment of £20, which has been violated; the bringing of an action implies, in short, the existence of a right of action. When, therefore, A applies to an English court to enforce a right acquired in France, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French court. A complains, for example, of the non-payment of a debt contracted by X in Paris, or seeks damages for an assault committed on him by X in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired. He must show that the debt is due under French law, or that the assault is an offence punishable by French tribunals. English law does not, speaking generally, apply to transactions occurring out of England; hence the foundation of A's claim is that he wishes to enforce rights actually obtained in France, and he will, as a rule, fail to make out his case unless he can show that the grievance of which he complains is recognized as such by French law, or, in other words, unless he can show a right to redress recognized by the law of France.

Whether such a right actually exists, *i. e.*, whether A has an "acquired right," is a matter of fact depending upon the law of France and upon the circumstances of the case.

PILLET, "Essai d'un système général de solution des conflits des lois" (1894), 21 *Clunet*, 417, 711. — Whenever the question is raised as to the international nature of a law, one of two answers must be given; the law may be either territorial or extraterritorial. It may be territorial, and then every one in the country is submitted to its jurisdiction without distinction between natives and foreigners domiciled or not domiciled, but, upon the other hand, on leaving the country, each ceases to owe it obedience; or it may be extraterritorial, and the contrary effect produced; where upon once being applied to a person (by virtue of his nationality or his domicile, opinions differ) the law follows him everywhere. . . .

Law should combine, and always does combine, certain characteristics

which are indispensable to its effect, qualities without which it would have no reason for existence. . . . We shall notice here but two, the only important qualities from an international point of view, but of the utmost importance: continuity and generality of application. When we say that law is by its nature continuous, we mean that its authority should be uninterrupted; from the day of its promulgation to the day of its repeal the law must always be heard and obeyed. . . . It is just as necessary that every law should be general in application to its subjects. . . . Order is necessary to every State, and order exists in the domain of law only in so far as the law is applied without distinction to every person within the limits of the State. . . .

From an international point of view, continuity necessarily implies extraterritoriality, generality of application, territoriality. . . . For a law to be truly continuous, it must apply under all circumstances to the person subject to it, it must follow him abroad when he leaves his country, and it must rule all his affairs there as well as in his own country. . . . To take the common example of a law of capacity: suppose it ceases to apply to a person when he leaves his own country, or that it only remains inapplicable to such of the person's property as is situated in a foreign country, and it will be clear that the law misses its object because it misses continuity of effect. . . . One can see that if, in the case of the same person, a period of complete incapacity is followed by a period of limited capacity, all the results that the legislator might attain by the rules he established will be forever compromised by the breach of continuity which will be produced in the application of the rule. In the same way generality is inseparable from territoriality. . . . That order which it is the object of the law to establish would not exist, unless all matters within the control of the society which is ruled by the law were equally subject to its provisions. . . .

Now let us see what would happen if each State in administering justice should carry the consequences of this situation to its logical conclusion. . . . No State would then suffer the application of any foreign law in its territory. Trusting in the generality of its own law, and the territoriality which logically flows from it, the State would assert its authority in all foreign interests which asked aid of its justice. But on the other hand, by a deduction drawn from the character of continuity and extraterritoriality, equally belonging to it, it would apply its own law also to the interests of its own subjects in foreign lands. One must conclude that the harmony which should exist between the laws of various countries can be obtained only through a sacrifice. . . .

The solution of this question cannot depend in every case on the will or the fancy of the one who, as juriconsult, or as judge, has it to solve. In other words, the territoriality or the extraterritoriality of laws cannot be abandoned to arbitrary will, or as we say, in terms at once fitter and more classic, to the comity of nations. . . . We

must discover some law of harmony, choose indifferently or for simple reasons of equity, either the territoriality of laws or their extraterritoriality; find the principle of harmony which will destroy as little as possible the useful effect of the law, or in other words leave intact as great part as possible of the authority of law. . . . Let us suppose a conflict on the age of majority, in our country twenty-one years, but by the foreign personal law of the party twenty-five years. The French judge has before him two solutions, two means of putting an end to conflict and establishing harmony: to apply the local law by virtue of its territoriality, or the personal law of the foreigner by virtue of its extraterritoriality. Each of the solutions has its advantages and disadvantages. The first is more favorable to the public order and credit; if it is adopted, every one within the territory will be of age at twenty-one years, and one will never have to suspect hidden facts which may lead to the application of a foreign law. On the other hand, it will have the disadvantage that the foreigner in question will suddenly come of age upon crossing the boundary of the country. The other solution would have neither this disadvantage nor the corresponding advantage. Can one suppose that a judge, if not bound by any provision of positive law, could hesitate between the two? The experience of the past answers the question clearly. Hesitation is impossible, because, of the two solutions, the first in return for a slight advantage involves a disadvantage which almost totally destroys the utility of such a law. What is the use of prolonging minority until a given age, if the minor may by a journey free himself from the incapacity? Such a solution reduces almost to naught the authority of the law on this point, whilst the other solution maintains the chief and essential features of its authority, and sacrifices only a territorial effect of little importance in this connection. . . . The great school of "statutaries" thought that the international effect of laws should depend on their object; meaning by this ambiguous word, object, the person or thing which is directly and immediately affected by the law. We thus reach the essential distinction between the two classes, — real laws which were territorial, and personal laws recognized as extraterritorial, — so completely that the two expressions were synonymous. . . . The extraterritorial application of laws relative to the person did not cease to cause them doubt and even remorse. They accepted it, but usually in spite of themselves; as is sufficiently proved by the eagerness with which they recurred to territoriality whenever on the slightest pretext they deemed themselves authorized to do so. In fine, the distinction made by this school, even supposing it applicable to the facts (which the invention of "statutes mixed" shows to be doubtful) had no principle behind it; this error was its greatest, but it was irremediable. . . .

One cannot deny that the essential feature of law is its social object. If, in fact, one analyzes the idea of law in any one of its applications, one necessarily reaches this first conclusion, that law is always the means

employed by the legislator to reach a determined social object. . . . The object of a law is not the immediate effect it has in view: that is the very content of the law, the means employed by the legislator to reach the object, not the object itself. . . . The social object to be attained is the *raison d'être* of the law, gives it its distinctive characteristics, assigns it its period; is it not logical, therefore, to conjecture that its international effect should be measured by its social object? Such is in fact the rule we propose. We know that laws are by nature at once territorial and extraterritorial, that they may in international relations preserve but one of these characters; we think that in each case the choice of character should be determined by considering the social object of the law. We shall declare territorial all laws the object of which could not be attained if in each country they did not apply as well to foreigners as to citizens; extraterritorial all laws the object of which requires that they should follow everywhere the person who comes under the force of their provisions. In every case, then, we shall consult the social object of the law under examination; that will be the only key to the problem of conflicts, the rule by which we shall resolve whether a law should be regarded as territorial or extraterritorial. . . .

Like the needs which it is their purpose to satisfy, laws can have one only of two objects: to protect the private interests of individuals, or to secure the conditions of existence and the functional operations of the body politic. That is their social object, the result to which they tend; a result which concerns the legislator only by reason of the influence it exercises on the condition of society. To the first category will belong laws which have for their end to place the individual in the position most favorable for his development and preservation; such are laws of the family, which have for end to establish in the persons concerned a unity of interests and responsibilities conforming to their natural affinities; in the same way, laws which have for end to advise, to guide those who cannot look out for themselves; finally, those which will have the good result of saving one from his own devices. To the same category belong laws destined to assure to every one the fruits of his toil. The second class of laws is made up of those which have for their end to determine the general conditions of society; one will generally recognize them easily by the circumstance that within the borders of a country they interest all persons equally, whatever their condition, because the interest of each one in having them observed is the same as the interest all have in the maintenance of the political body based upon them. . . .

Laws for individual protection should be extraterritorial. This is in fact implicitly included in the very idea of protection. For protection to be efficacious it must be complete, or, to return to familiar terms, continuous. It should be continuous in time and space; suffer no interruption, for one moment of interruption always compromises, and may suffice to ruin the effect of long continued protection. It must be continuous in space, by which we understand that the person should

be protected everywhere; and if, as often happens, he owns goods in several countries, thus subjected in fact to several different sovereignties, the law which protects him should extend to all his interests in spite of differences in the laws which complicate matters. All protection is armor, which does not fulfil its office unless it is without flaw. . . .

Laws for the security of society include all provisions deemed by the legislature necessary to the existence of the State, and to the performance of its various functions. It is of the first importance that within a country all wills without exception, including both natives and foreigners, should yield obedience to laws for the security of society. These laws are imposed on citizens only because they are absolutely requisite for the interest of society; those sacrifices of interest required of citizens may all the more be required of foreigners, mere guests. . . .

Does a law have in view individual interests or the interests of society? Supposing it to be applied, is it the individual to whom it is applied who will be benefited, or is it society as a whole? . . . One may ask (which amounts to the same thing) whether an individual or the body politic would suffer loss by its repeal or non-enforcement. . . .

A third method may be usefully employed in the most embarrassing cases. When a law has been made for the purpose of the security of society, all citizens profit equally every time it is applied; if it has been made for the protection of individuals, those benefit by it directly who enjoy the rights it creates, and the common good is only an indirect and minor consequence of the good of those individuals. Let us consider together two doctrines, the right and the lack of right, respectively, to establish paternity. They seem equally to concern the State and individuals. The law which authorizes the establishment of paternity may seem to be a law for the security of society, for it facilitates the natural classification of individuals; but it is easy to see that society derives advantage from its provisions only as a result of the fortunate effect which its application has upon the condition of the parties. To the legitimate child it is a matter of entire indifference. On the other hand, the law which forbids it has evidently been passed not out of favor to the seducer, but by reason of a quite legitimate fear of the scandal which such suits cause. No one can claim an individual interest in the application of this law, but all the members of society have an equal interest in its being observed; the interest is entirely political, and the rule should be regarded as territorial.

SECTION II.

CAPACITY.

MALE v. ROBERTS.

NISI PRIUS, IN THE COMMON PLEAS. 1800.

[Reported 3 *Espinasse*, 163.]

ASSUMPSIT for money paid, laid out, and expended, to the use of the defendant; money lent and advanced, with the other common money counts.

Plea of the general issue.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the Royal Circus. While the company were performing at Edinburgh, in Scotland, the defendant had become indebted to one Cockburn, for liquors of different sorts, with which Cockburn had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave Scotland, Cockburn arrested him, by what is there termed a Writ of Fugé, the object of which is to prevent the debtor from absconding.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

LORD ELDON. It appears from the evidence in this cause, that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?

Best, Sergeant, for the defendant, contended, that the contract was to be governed by the laws of England; in which case, the plaintiff could recover for necessaries only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

LORD ELDON. What the law of Scotland is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The

law of the country where the contract arose, must govern the contract ; and what that law is, should be given in evidence to me as a fact. No such evidence has been given ; and I cannot take the fact of what that law is, without evidence.

The plaintiff failed in proving his case, and was nonsuited.¹

COOPER v. COOPER.

HOUSE OF LORDS (SCOTCH APPEAL). 1888.

[Reported 13 Appeal Cases, 88.]

LORD HALSBURY, L. C.² My Lords, in this case the appellant, the widow of a domiciled Scotchman, seeks to set aside an antenuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage ; but, without minutely considering the evidence, I am satisfied with the conclusion of the Lord Ordinary, that the contract was executed before the marriage, a conclusion which, indeed, is but feebly contested on the other side.

A Scottish widow is entitled to her *jus relictæ* and to her terce, unless they have been discharged ; and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what forum can decide the controversy between the parties and what law that forum should administer in deciding it. Now it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor ; and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor, a question to be determined in a great measure by the position of the parties and the provisions of the contract itself, the first question arises here whether a domiciled Irishwoman could bind herself at all, while a minor, by a contract executed in Ireland.

There can be no doubt as to what would be the rule of English law in this respect. The line of cases which were brought to your Lordships' attention upon the subject of provisions whereby the common-law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and Courts of Equity have from time to time considered and

¹ Acc. *U. S. v. Garlinghouse*, 4 Ben. 194 (*semble*) ; Appeal of Huey, 1 Grant Cas. 51. See *Thompson v. Ketcham*, 8 Johns. 190 ; where it was assumed that the law of the place of contracting governed, but in the absence of evidence that defendant was by that law incapable the plaintiff recovered. — Ed.

² Parts of the opinions only are given. — Ed.

acted upon their view how far the provision for the wife has complied with the conditions of the statute; but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has with his usual precision laid down the rule (*Conflict of Laws*, § 64) that if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: *quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam*.

There is an unusual concurrence in this view amongst the writers on international law: *qua ætate minor contrahere possit et ejusmodi respicere oportet ad legem, cujusque domicilii*: Burgundus, Tract 2, n. 6. C'est ainsi que la majorité et la minorité du domicile ont lieu partout même pour les biens situés ailleurs: 1 Boullenois, Princip. Gen. 6. Quotiescunque de habilitate aut de inhabilitate personarum quærat, toties domicilii leges et statuta spectanda: D'Argentré. So also J. Voet: Quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sit ut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra.

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and as a consequence a Scottish domicil, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicil, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) the place of married life should remain in Ireland as if they had emigrated altogether and gone to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails. . . .

LORD WATSON. . . . Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil, or by the *lex loci contractus*, has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicil, and also the place where the contract was made. It was argued, however, for the respondents, that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland, as the *lex loci solutionis*. I am by no means

satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force and be performed in any other country where they might, from choice or necessity, take up their abode. Apart from that consideration, and assuming Scotland to have been, in the strictest sense of the term, the *locus solutionis*, I think the argument of the respondents is untenable. The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent; and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. That principle can, in my opinion, have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile and also of the place of contracting, incapable of giving consent. . . .

LORD MACNAGHTEN. . . . It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favor of the law of the domicile. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile. . . .

*Appeal allowed.*¹

MILLIKEN v. PRATT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 125 Massachusetts, 374.]

CONTRACT to recover \$500 and interest from January 6, 1872. Writ dated June 30, 1875. The case was submitted to the Superior Court on agreed facts, in substance as follows:

The plaintiffs are partners doing business in Portland, Maine, under

¹ See *In re Cooke's Trusts*, 56 L. J. Ch. 637. — ED.

the firm name of Deering, Milliken & Co. The defendant is, and has been since 1850, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

"Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this to be a continuing guaranty. Sarah A. Pratt."

This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post-office in Portland early in February, 1870.

The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and, if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding \$500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to \$860.12, upon which he paid \$300, leaving a balance due of \$560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiffs' store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs by express from Portland to Daniel in Massachusetts, who paid all express charges. The parties were cognizant of the facts.

By a statute of Maine, duly enacted and approved in 1866, it is enacted that "the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." The statutes and the decisions of the court of Maine may be referred to.

Payment was duly demanded of the defendant before the date of the writ, and was refused by her.

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

GRAY, C. J. The general rule is that the validity of a contract is to be determined by the law of the State in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. *Scudder v. Union National Bank*, 91 U. S. 406. Even a contract expressly

prohibited by the statutes of the State in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a State the laws of which permit it. *Greenwood v. Curtis*, 6 Mass. 358; *M'Intyre v. Parks*, 3 Met. 207.

If the contract is completed in another State, it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter, across the boundary line between the two States. As was said by Lord Lyndhurst, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & Cl. 342, 363. So if a person residing in this State signs and transmits, either by a messenger or through the post-office, to a person in another State, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth. *M'Intyre v. Parks*, above cited.

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine. *Orcutt v. Nelson*, 1 Gray, 536; *Kline v. Baker*, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. *Jordan v. Dobbins*, 122 Mass. 168. It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. St. of Maine of 1866, c. 52; *Mayo v. Hutchinson*, 57 Maine, 546. The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. Gen. Sts. c. 108, § 3; *Nourse v. Henshaw*, 123 Mass. 96. Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, c. 184; *Major v. Holmes*, 124 Mass. 108; *Kenworthy v. Sawyer*, 125 Mass. 28.

The question therefore is, whether a contract made in another State by a married woman domiciled here, which a married woman was not

at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that State to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicile, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicile, be deemed capable of making it.¹

Mr. Westlake, who wrote in 1858, after citing the decision of Lord Eldon,² well observed, "That there is not more authority on the subject may be referred to its not having been questioned;" and summed up the law of England thus: "While the English law remains as it is, it must, on principle, be taken as exceeding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." "The validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractus*; that is, not to its particular provisions on the capacity of its domiciled subjects, but in this sense, that, if good where made, the contract will be held good here, and conversely." Westlake's Private International Law, §§ 401, 402, 404.³

In *Greenwood v. Curtis*, Chief Justice Parsons said, "By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be

¹ The learned Chief Justice here examined the following cases: *Ex parte Lewis*, 1 Ves. Sen. 298; *Morrison's Case*, Mor. Dict. Dec. 4595; *Ex parte Watkins*, 2 Ves. Sen. 470; *In re Houston*, 1 Russ. 312; *Johnstone v. Beattie*, 10 Cl. and F. 42; *Stuart v. Bute*, 9 H. L. C. 440; *Nugent v. Vetzera*, L. R. 2 Eq. 704; *Woodworth v. Spring*, 4 All. 321; *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 189. — Ed.

² *Male v. Roberts*, *supra*. — Ed.

³ The learned Chief Justice here stated *In re Hellmann's Will*, L. R. 2 Eq. 363; and criticised the following Louisiana cases: *Baldwin v. Gray*, 16 Mart. 192; *Saul v. His Creditors*, 17 Mart. 569; *Andrews v. His Creditors*, 11 La. 464; *Le Breton v. Nouchet*, 3 Mart. 60; *Barrera v. Alpuente*, 18 Mart. 69; *Garnier v. Poydras*, 13 La. 177; *Gale v. Davis*, 4 Mart. 645. — Ed.

prohibited to our citizens;" and that the Chief Justice considered this rule as extending to questions of capacity is evident from his subsequent illustration of a marriage contracted abroad between persons prohibited to intermarry by the law of their domicil. 6 Mass. 377-379. The validity of such marriages (except in case of polygamy, or of marriages incestuous according to the general opinion of Christendom) has been repeatedly affirmed in this Commonwealth. *Medway v. Needham*, 16 Mass. 157; *Sutton v. Warren*, 10 Met. 451; *Commonwealth v. Lane*, 113 Mass. 458.

The recent decision in *Sottomayor v. De Barros*, 3 P. D. 1, by which Lords Justices James, Baggallay, and Cotton, without referring to any of the cases that we have cited, and reversing the judgment of Sir Robert Phillimore in 2 P. D. 81, held that a marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying except by a Papal dispensation, was therefore null and void in England, is utterly opposed to our law; and consequently the dictum of Lord Justice Cotton, "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil," is entitled to little weight here.

It is true that there are reasons of public policy for upholding the validity of marriages, that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested, than in the recognition of the validity of a marriage contracted in another State, which is not authorized by the law of the domicil, and which permanently affects the relations and the rights of two citizens and of others to be born.

Mr. Justice Story, in his *Commentaries on the Conflict of Laws*, after elaborate consideration of the authorities, arrives at the conclusion that "in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done;" or as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." Story *Conf.* §§ 103, 241. So Chancellor Kent, although in some passages of the text of his *Commentaries* he seems to incline to the doctrine of the civilians, yet in the notes afterwards added unequivocally concurs in the conclusion of Mr. Justice Story. 2 Kent *Com.* 233 note, 458, 459 & note.

In *Pearl v. Hansborough*, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate

use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicile, though incapable by the law of the place of the contract. *In re Hellmann's Will*, and *Saul v. His Creditors*, above cited. But that alternative is not here presented. In *Hill v. Pine River Bank*, 45 N. H. 300, the contract was made in the State of the woman's domicile, so that the question before us did not arise and was not considered.

The principal reasons on which continental jurists have maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they may go, appear to have been that each State has the rightful power of regulating the status and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners, and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized States recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicile of the person, the protection extends.

On the other hand, it is only by the comity of other States that laws can operate beyond the limit of the State that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one State to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

As the law of another State can neither operate nor be executed in this State by its own force, but only by the comity of this State, its operation and enforcement here may be restricted by positive prohibition of statute. A State may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. Under the French code, for instance, which enacts that the laws regulating the status and capacity of persons shall bind French subjects, even when

living in a foreign country, a French court cannot enforce a contract made by a Frenchman abroad, which he is incapable of making by the law of France. See Westlake, §§ 399, 400.

It is possible also that in a State where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the State, for the protection of its own citizens, that it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract.

But it is not true at the present day that all civilized States recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many States they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business, and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

*Judgment for the plaintiffs.*¹

FREEMAN'S APPEAL.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1897.

[*Reported 68 Connecticut, 533.*]

BALDWIN, J. Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this State until his death. Her marriage gave her, under the laws of the State then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a juridical point of view, was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift's Dig. 30. If she assumed to make such a contract, it was absolutely void.

These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. To preserve

¹ *Acc.* Bowles v. Field, 78 Fed. 742; Bell v. Packard, 69 Me. 105; Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418; Baum v. Birchall, 150 Pa. 164, 24 Atl. 620; Case v. Dodge, 18 R. I. 661, 29 Atl. 785. *Contra*, Guépratte v. Young, 4 De G. and S. 217; Matthews v. Murchison, 17. Fed. 760 (*semble*). See Hill v. Pine River Bank, 45 N. H. 300. — ED.

what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the State. *Jackson v. Hubbard*, 36 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. *Kilbourn v. Brown*, 56 Conn. 149. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. General Statutes, § 2796.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. Anson's Principles of Contract, 328. If he could, his private agreements would outweigh the law of the land. *Jus publicum privatorum pactis mutari non potest.*

Cverture constitutes such a status, and one of its incidents in this State, at the time of Mrs. Mitchell's marriage, was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute, unless both husband and wife have executed for public record a written contract, by which both accede to the provisions of the statute of that year and accept the rights which it offers to them. General Statutes, § 2798. No such contract was ever executed by Mrs. Mitchell.

The claim in favor of the First National Bank of Chicago which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing dated in Illinois but signed in this State. The creditor had agreed, in Illinois, with the firm to forbear suit if she and they (as a firm and individually) would become parties to such a paper; and, after they had signed it there, had given it to her husband, in Illinois, to take to her, in this State, for execution. He procured her signature and then mailed the instrument to one of his partners at Chicago, by whom it was there delivered to the bank. The agreement of forbearance had been conditioned on the execution of the guaranty by the firm, its individual members, and Mrs. Mitchell. It was her credit only that was to give it value. Its execution by the others gave the bank nothing which it did not have, as fully, before. It did not become complete until it received her signature. It did not then become operative as a security, until it had been delivered to the creditor.

Her husband cannot be deemed to have acted in procuring Mrs. Mitchell's signature, as the agent of the bank. No finding to that effect was made by the trial court, and no such agency is implied from the circumstances of the transaction. He had a direct interest in obtaining the desired extension of credit. He was a principal in the

obligation. He sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented any one but himself, it was his copartners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority, as her agent, to make or procure such a delivery at some subsequent time.

If, therefore, the guaranty, so far as concerns her obligation upon it, was ever delivered, it was delivered, and so first took effect, in Chicago. But its delivery there could not effect her, unless it was made by her or by her authorized agent. Morse, the partner who actually handed it to the bank, stood in no better position than her husband, whether regarded as the servant of the latter, or as a partner with him. In either case, the agency, by virtue of which the delivery was made, was created, if at all, in Connecticut.

But to create an agency is to enter into a contractual relation. Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect to her husband, could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered.

It is true, that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that as to the principals in the transaction it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it. *Cooper v. Cooper*, L. R. 13 App. Cases, 88, 99, 100; *Story on the Conflict of Laws*, §§ 64, 65, 66 *a*, 136; *Dicey on the Conflict of Laws*, Chap. XVIII. Rule 123.

Had Mrs. Mitchell been within the State of Illinois, when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that State as to subject her to its laws, in respect to acts done within its jurisdiction. But as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to

the authority of the agent, and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol.

The order drawn by Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might otherwise be coming to her as part of the estate in his hands, though dated at Chicago, was brought to her in behalf of the bank in Connecticut, signed and given back to the agent of the bank in Connecticut, accepted by the executor in Connecticut, and then mailed in Connecticut by its agent to the bank at Chicago. The whole transaction, therefore, was completed here. The order became operative, if at all, to transfer her interest in her father's estate, when the executor had notice of it, and agreed to comply with it by handing his written acceptance to the agent of the bank. That Mr. Mitchell was acting in that capacity seems clear from the finding that the bank, after the firm had become insolvent and made an assignment for the benefit of its creditors, prepared the paper and sent it to him, to procure her signature to it. No assignment which she could make would benefit the firm. If its result was to satisfy the claim of the bank, she would be subrogated to its place, and their creditors would receive no greater dividend. The order, also, was for the payment of a share in the estate of a deceased citizen of Connecticut, in course of settlement in its courts. Under these circumstances, its validity must be determined by the laws of Connecticut, and being dependent on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void.

There have been cases not differing essentially in principle from that at bar, in which courts, to whose opinions great consideration is due, have come to conclusions varying from those which we have reached. The leading one is *Milliken v. Pratt*, 125 Mass. 374. There a guaranty by a married woman of such debts as her husband might thereafter contract was signed in Massachusetts, delivered there by her to him, and by him there mailed to the other party, in Maine. The court held that the contract became complete when the guaranty was received and acted upon by the latter, and not before; and enforced it as one made and to be performed in Maine, where married women then had power to enter into such agreements. No reference was made to the fact (which may, perhaps, have been immaterial under the laws of Massachusetts), that the delivery was made by the husband, acting as the agent of the wife, — a fact which, in our view under the common law of Connecticut, is of controlling importance.

Engagements which coverture prevents a woman from making herself, she cannot make through the interposition of an agent, whom she assumes to constitute as such in the State of her domicil. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a State to lend the aid of its courts to enforce a security

which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois, than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery.

The Superior Court is advised to disallow all and every part of the claim of the First National Bank.

In this opinion the other judges concurred.

NICHOLS & SHEPARD COMPANY v. MARSHALL.

SUPREME COURT OF IOWA. 1899.

[Reported 108 Iowa, 518.]

DEEMER, J. Defendant is a married woman domiciled in this State. On or about the ninth day of July, 1894, she signed the note in suit, in the State of Indiana, at which place she was temporarily visiting, as surety for Milton W. Gregory. The note was made payable at the Indiana National Bank of Indianapolis. The laws of Indiana (section 6964, Burns' Rev. St.) provide that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is insisted on behalf of appellant that as defendant was domiciled in this State at the time she made the note, her capacity to contract followed her into the State of Indiana, and validated her contract made in that commonwealth, and that the right of a married woman to make a contract relates to her contractual capacity, and, when given by the law of the domicil, follows the person. Our statutes permit the making of contracts of suretyship by married women, and, if appellant's postulate be correct, it follows that plaintiff is entitled to recover. The general rule seems to be, however, that the validity, nature, obligation, and interpretation of contracts are to be governed by the *lex loci contractus aut actus*. Savary v. Savary, 3 Iowa, 272; Boyd v. Ellis, 11 Iowa, 97; Arnold v. Potter, 22 Iowa, 194; McDaniel v. Railway Co., 24 Iowa, 417; Burrows v. Stryker, 47 Iowa, 477; Bigelow v. Burnham, 90 Iowa, 300. The rule is also well settled that personal status is to be determined by the *lex domicilii*. Ross v. Ross, 129 Mass. 243. Continental jurists have generally maintained that personal laws of the domicil, affecting the status and capacity of all inhabitants of a particular class, bind them, wherever they may go, and that the validity of all contracts, in so far as the capacity of the

parties to contract is involved, depends upon the *lex domicilii*. Thus, the Code of Napoleon enacts, "The laws concerning the status and capacity of persons govern Frenchmen, even when residing in a foreign country." See also Story, *Conflict of Laws* (8th ed.), §§ 63-66; Wharton, *Conflict of Laws* (2d ed.), § 114. Some of the English cases have also followed this rule. *Guepratte v. Young*, 4 De Gex & S. 217, 5 Eng. Ruling Cas. 848; *Sottomayor v. De Barros*, 47 Law J. Prob. 23, 5 Eng. Ruling Cas. 814. But see, apparently to the contrary, *Burrows v. Jemino*, 2 Strange, 733; *Heriz v. De Casa Riera*, 10 Law J. Ch. 47. We do not think the continental rule is applicable to our situation and condition. A State has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country, where travel is so common, and business has so little regard for State lines, it is more just, as well as more convenient, to have regard to the laws of the place of contract, as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts, than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. Indeed, it is a rule of almost universal application that the law of the State where the contract is made and where it is to be performed enters into, and becomes a part of that contract, to the same extent and with the same effect as if written into the contract at length. Each State must prescribe for itself who of its residents have capacity to contract, and what changes shall be made, if any, in the disabilities imposed by the common law. Thus, in *Thompson v. Ketchum*, 8 Johns. 192, the note was made in Jamaica. The defence was infancy, according to the laws of New York. It was determined that the transaction was subject to the laws of the place of contract, and that infancy was a defence, or not, according to the laws of Jamaica. Mr. Justice Story, in his commentaries on *Conflict of Laws*, says: "In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, where the contract is made or the act done." Story, *Conflict of Laws*, §§ 103, 241. See, also, 2 Kent Commentaries, 238, note; 2 Kent Commentaries, 458; 2 Kent Commentaries, 459, note. It will be observed that Chancellor Kent, in some passages of his text, seems to incline to the civilian doctrine, yet the notes clearly indicate that he concurs with Justice Story. See further, on this subject, Story, *Conflict of Laws* (4th ed.), §§ 101, 102. The case of *Pearl v. Hansborough*, 9 Humph. 426, is almost exactly in point. In that case a married woman, domiciled with her husband in the State of Mississippi,

by the law of which a purchase by a married woman was valid, and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting. The contract was held void and unenforceable in Tennessee. See, also, *Male v. Roberts*, 3 Esp. 163; *Milliken v. Pratt*, 125 Mass. 374; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. 500 (20 Atl. Rep. 84); *Baum v. Birchall*, 150 Pa. St. 164 (24 Atl. Rep. 620); 2 Parsons, Contracts (8th ed.), *574, note; 2 Parsons, Contracts, *575-578. *Saul v. Creditors*, 5 Mart. (N. s.) 569, seems to be opposed to this rule. But as the case is from Louisiana, which State follows the civil law, it is not an authority. We may safely affirm, with Chancellor Kent, that while the continental jurists generally adopt the law of domicile, supposing it to come in conflict with the law of the place of contract, the English common law adopts the *lex loci contractus*. Lord Eldon, in *Male v. Roberts*, *supra*, said: "It appears from the evidence in this case that the cause of action arose in Scotland, and the contract must be therefore governed by the laws of that country, where the contract arises. Would infancy be a good defence by the laws of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessities, I cannot say; but, if the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence." It would seem, in this case, though not distinctly stated, that both parties were domiciled in England. The result of the application of these rules is that the contract was void where executed, and will not be enforced by the courts of this State.

Affirmed.

SWANK v. HUFNAGLE.

SUPREME COURT OF INDIANA. 1887.

[Reported 111 Indiana, 453.]

ELLIOTT, J. The appellant sued the appellee, Melissa Hufnagle, and her husband, upon a note and mortgage executed in Darke County, Ohio, on land situate in this State. The appellee, Melissa Hufnagle, answered that she was a married woman, and that the mortgage was executed by her as the surety of her husband, and assumed to convey land in this State owned by her. The appellant replied that the con-

tract was made in Ohio, and that by a statute of that State a married woman had power to execute such a mortgage, but the statute of Ohio is not set forth.

The trial court did right in adjudging the reply bad. The validity of the mortgage of real property is to be determined by the law of the place where the property is situated. Mr. Jones says: "A mortgage of course takes effect by virtue of the law of the place where the land is situated." 1 Jones, *Mortg.* § 823. This is well settled law. Story, *Conflict of Laws* (8th ed.), 609 auth. n.; *Bethell v. Bethell*, 92 Ind. 318.

Judge Story, in sections 66 and 102 of his work on the *Conflict of Laws*, does not treat of conveyances or mortgages of land, but of contracts of an entirely different class, so that the appellant gets no support from what is there laid down as the law.

Under the act of 1881 a mortgage executed by a married woman as surety on land owned by her in this State is void.

There is another reason for adjudging the reply bad, and that is this, it does not set out the foreign statute on which it professes to be based. It is well settled that where a pleading is founded on a foreign statute the statute must be set forth. *Wilson v. Clark*, 11 Ind. 385; *Mendenhall v. Gately*, 18 Ind. 149; *Kenyon v. Smith*, 24 Ind. 11; *Tyler v. Kent*, 52 Ind. 583; *Milligan v. State, ex rel.*, 86 Ind. 558.

We cannot disturb the finding on the evidence.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. In the argument on the petition for a rehearing, counsel contend that we were in error in holding that a mortgage executed by a married woman in Ohio as surety for her husband cannot be enforced in this State, and they refer us to cases holding that the construction of a contract is governed by the law of the place where it was made. But the argument is unavailing, for counsel mistake the point in dispute. The question is not how the contract shall be construed, but had the married woman capacity to execute it? The question is one of capacity, not of construction. The trial court was not asked to construe a mortgage, but to enforce one which our statute declares shall not be enforceable. The purpose of the suit is not to obtain a judicial interpretation of a contract, but to foreclose a mortgage which our law declares a married woman has no capacity to execute.

We suppose it quite clear that if the mortgagor has no capacity to execute a deed or mortgage, the instrument cannot be enforced, although the incapacity is established by the law of the place where the land is situated. If, for instance, a married woman should execute a deed or mortgage without her husband joining with her, it could not be enforced in a State where the law required her husband to join. This is so because the question is one of power, and power

is created or withheld by the law of the place where the land lies. It is hardly necessary to cite authorities upon this elementary proposition, but there is so conveniently at hand a decision of the Supreme Court of Ohio, where the rule is affirmed, that we cite it. *Brown v. National Bank*, 44 Ohio St. 269. In that case it was said: "We are not unmindful of the principle that deeds intended to convey or encumber an interest in land situated in one State, executed in another, must derive their vitality from the laws of the former."

Our statute provides that the deeds of persons under twenty-one years of age shall be voidable, and this law would undoubtedly entitle an infant under that age to avoid a deed to land in this State executed in Ohio, and the principle in such a case is the same as that which rules here, for, in both cases, the question is one of capacity. In discussing this question an American author says: "But in reference to contracts about the sale and conveyance of land such capacity depends upon the laws of the State wherein the land is situated. This is the general ruling in America as to the law upon these subjects, in whatsoever court the question may arise, domestic or foreign. This rule applies to questions of infancy, coverture, majority, and of legal capacity generally." Rorer, *Inter-State Law*, 190; 1 Jones, *Mortg.*, § 662; 4 Kent *Com.*, star p. 441.

*Petition overruled.*¹

SELL v. MILLER.

SUPREME COURT OF OHIO. 1860.

[*Reported 11 Ohio State*, 331.]

BY THE COURT. Where a married woman over eighteen, but under twenty-one years of age, has her domicil, and joins with her husband in the execution of a mortgage, within a foreign jurisdiction, where the age of majority is fixed at twenty-one years, upon real estate situate in Ohio, held: That such mortgage is not invalid for want of capacity on her part to contract; the capacity to contract, in respect to immovables, being governed by the law of the situs, and not by the law of the domicil.

Motion overruled.

¹ *Acc. Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Cochran v. Benton*, 126 Ind. 58; *Frierson v. Williams*, 57 Miss. 451; *Johnson v. Gawtry*, 1 Mo. App. 322; *Wood v. Wheeler*, 111 N. C. 231; *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620. *Contra*, *Kelly v. Davis*, 28 La. Ann. 773. — Ed.

IN RE HELLMANN'S WILL.

CHANCERY. 1886.

[*Reported Law Reports, 2 Equity, 363.*]

CHRISTIAN HELLMANN, being domiciled in England, by his will bequeathed the sum of £250 to each of the two children of Charlotte Helsig. These children were a daughter, aged eighteen, and a son, aged seventeen, both resident and domiciled in Hamburg.

According to the law of Hamburg, girls become of age on completing their eighteenth year; boys, on completing their twenty-second. By the same law the father of an infant is entitled, as guardian, to receive a legacy bequeathed to the infant.

Under these circumstances the executors applied, under the Acts 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, for the direction of the court as to the payment of the legacies.

LORD ROMILLY, M. R. I am of opinion that the legacy to the daughter, who is of age according to the law of Hamburg, may be paid to her on her own receipt. The legacy to the son may be paid to him on his attaining full age according to English law or according to the law of Hamburg, whichever first happens; in the meantime it must be dealt with in the usual way as an infant's legacy.¹

WOODWARD v. WOODWARD.

SUPREME COURT OF TENNESSEE. 1889.

[*Reported 87 Tennessee, 644.*]

FOLKES, J. This is a petition by Rosa P. Woodward, filed in the Probate Court of Shelby County, against her guardian, Emmet Woodward, in which she seeks to have a settlement of his guardian accounts, and to have the balance in his hands found due paid over to her.

She alleges her domicil and residence in the State of Louisiana, and sets up and exhibits with her petition certified copies of the proceedings had in that State, whereby she has been emancipated from the disabilities of infancy, under and in pursuance of the statute of the State authorizing, in certain cases, the emancipation of persons who have attained the age of eighteen. The petition alleges that, in consequence of such decree, she is, under the laws of the State of Louisiana, of full age, and as such entitled to demand and receive her estate.

¹ *Acc. Donohoe v. Donohoe*, 19 L. R. Ir. 349; 13 Clunet, 472 (Austria, 22 Jan. '81). And see *Kohne's Estate*, 1 Pars. Eq. Cas. 399.

In the same way a fund will be paid over to a married woman if by the law of her domicil she is authorized to receive it independently of her husband. *Ex parte Lett*, 7 L. R. Ir. 132. — Ed.

It is shown that both her parents are dead; that her father died of yellow fever, intestate, in 1873, leaving several children, all of whom are now over twenty-one years of age except petitioner, and have received from their guardian their share of their father's estate; that defendant, Emmet Woodward, was appointed guardian for herself and brothers and sisters by the Probate Court of Shelby County shortly after her father's death; that there is now in his hands about \$8,000 belonging to her, which he holds as such guardian; that shortly after her father's death, by proceedings duly had in the Probate Court of Shelby County, petitioner was adopted by C. Dickman, the husband of her maternal aunt, under and in pursuance of the statutes of Tennessee in such cases made and provided; that such adoption was with the consent and approval of the defendant, Emmet Woodward, her regular guardian; that several years thereafter C. Dickman removed from the State of Tennessee to the State of Louisiana with the view of taking up his permanent abode there, and has ever since and still does reside there, the State of Louisiana being the State of his domicil; that petitioner, after her adoption, became a member of the family of C. Dickman, her adoptive father, and did remove with him and his family to the State of Louisiana, and has ever since resided there; that Louisiana is the State of her domicil, and was at the time of the judicial proceedings therein resulting in her emancipation. She alleges in her petition that it is her desire, and to her interest, to have and receive the estate coming to her from her said father as aforesaid, by reason of the fact that it is now in the hands of the guardian, only yielding her a revenue of six per cent, charged with the commissions, expenses, and costs incident to such guardianship, while she can readily obtain a permanent eight per cent investment of her funds in the State of Louisiana, where that rate of interest is legal, freed from costs and expenses of guardianship. She insists that the State of Tennessee will recognize her majority as determined and fixed by judicial decree in the State of her domicil, and would recognize as valid any receipt, discharge, or acquittance that she might execute to her guardian for her estate now in his hands; and that the Probate Court will order and direct a settlement of accounts, and the paying over to her the balance found to be due, so that the said guardian, and his sureties on his official bond, may be discharged from all further liability.

To this petition the defendant interposed a demurrer, upon the ground that petitioner was still a minor under twenty-one years of age; that the proceedings had in the courts of Louisiana would have no extraterritorial effect by reason of the want of jurisdiction in said courts over the estate of the ward situated in Tennessee; that the proceedings had in Louisiana are unknown to the laws of Tennessee, and opposed to the policy of Tennessee law, and contrary to the interests of the citizens of Tennessee, and would, therefore, not be recognized in the courts of this State; that the said guardian is lawfully in possession of said funds under the laws of this State, and has been guilty of

no breach of duty in relation thereto; and that said petitioner, being a minor, cannot maintain this action in her own name.

The probate judge sustained the demurrer, and dismissed the petition. Petitioner has filed the record for a writ of error in this court.

There are certain general principles which control the disposition of this case. They are, in the main, well settled; the difficulty lies in their application to the particular facts of the case in hand.

"It is elementary that every State has an inherent right to determine the status or domestic or social condition of persons domiciled within its territory, except in so far as the powers in this respect are restrained by duties or obligations imposed upon them by the Constitution of the United States." *Strader v. Graham*, 10 How. 93.

Again, the civil status is governed universally by one single principle, — namely, that of domicile, — which is the criterion established by law for the purpose of determining the civil status, for it is on this basis that the personal rights of a party — that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy — must depend. *Udny v. Udny*, L. R. 1 H. L. Sc. 457.

It is not seriously controverted by counsel for defendant that the judicial decree under which the disabilities of minority were removed in Louisiana had the same effect as though, by direct statute, the age of majority had been fixed at eighteen, so far as the status of minors domiciled in that State is concerned. The main contention in this connection being that, the domicile of origin of petitioner having been in Tennessee, petitioner has acquired and could acquire no domicile in Louisiana by reason of her removal to that State by her adoptive father.

Before considering the question of removal and of the right of the adoptive father to acquire for his adopted child a new domicile, or, what is the same thing, the right or privilege of the adopted child to acquire a new domicile with her adoptive father, let us settle, if we can, what would be the proper disposition of the case had the petitioner been born and ever after domiciled in the State of Louisiana. In such cases we regard it as well settled that under unquestionable principles of private international law one State will recognize and give force and effect in its own tribunals to the legislation of another State, in so far as it fixes the status and capacity of married women and minors. This is frequently spoken of as a principle of comity; and while it doubtless has its origin in considerations of comity, it has been so repeatedly and emphatically recognized by the courts of all civilized countries that it is now thoroughly crystallized into rules and principles of private international law.

As is said in *Ross v. Ross*, 129 Mass. 243, in the elaborate discussion of the subject by Chief Justice Gray, "the status or condition of any person with the inherent capacity of succession or inheritance is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the

State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity in the State of the domicil.

"We are not aware of any case in England or America in which change of status in the country of the domicil, with the formalities prescribed by its laws, has not been allowed full effect as to the capacity thereby created of succeeding to and inheriting property in any other country, the laws of which hold a like change of status in a like manner, with a like effect, under like circumstances."

This principle is illustrated by the decree made *In re Da Cunha*, 1 Hagg. Ecc. R., page 237, where administration was granted in England, limited to the receipt of the dividend of a sum of English stock, to a Portuguese lady who, by the laws of her domicil, was emancipated from the disabilities of minority, but was, by the English law, still a minor. It was held that she was entitled to receive and receipt for the dividend on said stock in England.

It is true, as insisted by counsel for defendant, that there is no elaboration of decision and of discussion made by the judges in the disposition of this case, but this fact in no manner detracts from its force and effect as authority. It does settle and determine that a person of full age by the law of her domicil, though a minor by the laws of England, is entitled to receive and give a valid acquittance for property to which she is entitled in England; and such receipt, though confined to the dividend on the stock, is as conclusive of her right to act as a major as though she had received the corpus of the property, the dividend being all that she was, under the circumstances, entitled to. In Rule 32 of Dicey, we find it stated that the capacity of a person for the alienation of movables depends, so far as the question of infancy or majority is concerned, on the law of that person's domicil.¹

It is suggested, however, in response to this case, that the fact that the property going to the minor was by the will given to the minor by name, is indicative of the purpose to have the same paid over to the minor, according to the law of the place of her domicil, where her majority was reached at an earlier age than in England, and that for this reason it should not be controlling in a case where the property was inherited generally in one State, where twenty-one is the lawful age, and the full age at an earlier period is had by reason of the domicil in another State.

We cannot appreciate the force of this suggestion. The court, in disposing of the case, indicates in nowise that its judgment or conclusion was influenced by any such consideration, and, so far as the case goes, it is merely an announcement, and application of the general principles contended for by petitioner. Had any special regard been given to the fact that property was devised by will, instead of passing by law, it would have been more reasonable to have supposed that the

¹ The court here examined *In re Hellmann's Will*, L. R. 2 Eq. 363. — Ed.

testator intended it to be paid over according to the law of his own domicil, requiring guardians to receive and receipt for the fund devised to minors. That the court gave no attention to such considerations, is shown by the order made with reference to the boy, in directing that the fund should be paid to him when he attained his majority, either under the law of England or under the law of his domicil, whichever first happened.

This court has recognized the doctrine contended for by petitioner in the case of *Robinson v. Queen*, decided at Nashville and reported in 87 Tennessee, 445, where it is held that the judicial proceedings, under the laws of the State of Kentucky, emancipating married women from the disability of coverture, would be recognized and enforced in this State to the extent of allowing an action to be brought and maintained in the courts of this State against such married woman, on a note made by her in the State of Kentucky as surety for her husband, clearly recognizing that her status as a person *sui juris* fixed by judicial proceedings in the State of her domicil, would have full force and effect in this State.

To the same effect is the text in Wharton's Conflict of Laws, § 114, where the learned author says :

"A foreigner who is capable of business at his domicil must be recognized as so capable by our laws, even though if domiciled among us he would be incapable."

A near analogy to the present case, with reference to the recognition in one State of the status fixed by the law of the domicil is to be found in the case of children born out of wedlock, but made legitimate afterward according to the laws of their domicil, by the subsequent marriage of their parents. They are deemed everywhere legitimate for the purposes of inheritance, etc. *Andrews v. Andrews*, 24 Ch. Div. 637; *Miller v. Miller*, 91 N. Y. 315; *Scott v. Ney*, 11 La. Ann. 282. This doctrine is generally subject to exception concerning real estate, which is governed by the *lex rei sitæ*.

The law of divorce also furnishes a close analogy. Thus a divorce in a foreign jurisdiction for a cause which is not competent in the State of marriage, is recognized as valid in the latter if the former had jurisdiction of the parties for the purposes of the suit. *Sewall v. Sewall*, 122 Mass. 158; *Clark v. Clark*, 8 Cushing, 385; *Barber v. Root*, 10 Mass. 260.

In *Stephens v. McFarland*, 8 Irish Eq. Rep. 444, we have a case where a minor was insolvent in Southern Australia, by the laws of which a minor could be so adjudged; his assignee attempted in Ireland to obtain the real and personal property that passed to him under his father's will. The bill was demurred to and the demurrer overruled, the assignee being adjudged to have the title of the property coming to the insolvent minor.

The converse of the present case is found in *Kohne's estate*, 1 Parsons' Select Eq. Cases (Penn.), 399; the direct point was that the

power of attorney of a minor, who had not reached her majority by the law of her domicil, would not be recognized in Pennsylvania, although by the law of Pennsylvania she was then of full age. The judge delivering the opinion said, among other things, "that according to our law, in common with those of the civilized world, questions of minority and majority, in all controversies respecting personal estate, are to be determined according to the laws of the country in which the minor held his actual domicil, whether natural or acquired." See Story's Conflict of Laws, §§ 64, 65, 66, and 69.

Pothier states the rule thus: "The change of domicil delivers persons from the empire of the laws of the place they have quitted, and subjects them to those of the new domicil they have acquired."

Mr. Justice Story, after presenting the several views of some of the civil law writers who discuss the subject, says, at section 71: "Boullenois himself does not hesitate to declare the general principle to be incontestable, that the law of the actual domicil decides the state and condition of the person, so that a person by changing his domicil changes at the same time his condition."

The effect of the statute of Louisiana, under which the disabilities of this minor were removed, has been adjudged by the highest court of that State.

Thus, in 36 La. Ann. 250, it is said: "It places the minor thus freed on the same plane with the major, and invests him with identically the same rights, and subject to equal responsibilities. In other words, instead of leaving him subject to the operation of the general law, and making him wait until he is twenty-one years of age, it virtually and in effect fixed and established his majority at an earlier period of life, — that is, at any time when he shall have passed the age of eighteen years." So fully is his majority established that he is capable of filling the office of administrator, just as if twenty-one years of age. 12 La. Ann. 155. Under this legislative emancipation the party's disabilities of infancy are all removed. 6 Robinson, 429; 9 La. Ann. 155; 36 La. Ann. 250. He is estopped by it, and those dealing with him need look no further than his free papers. 36 La. Ann. 616.

The case of Galbraith v. Buner, 65 Mo. 349, urged by counsel for defendant as furnishing strong authority for their contention here, is not, in our opinion, entitled to the weight insisted upon. The case is extremely brief in its discussion, and assumes the very point in controversy, without reference to the various authorities bearing thereon.

Mr. Wharton, in his work on Conflict of Laws, at section 114, says of this case that it is "exceptional" and "arbitrary." Moreover, it may be distinguished from the case now before us in this, that the proceedings in Arkansas, the State of domicil of the minor, seem to have had for its object the emancipation of the minor only *pro tanto* — that is to say, the minor's disabilities were removed to the extent of authorizing him to go into the State of Missouri and there collect and receipt for the particular fund in the hands of his Missouri guardian.

It was not an out and out removal of all the disabilities of minority, but a special commission authorizing an incursion into the State of Missouri for the purpose of receiving and receipting for a particular fund. The Arkansas statute is not before us, and we only know its contents by the statement thereof, found in this Missouri case, from which it is apparent that it differs widely from the broad and comprehensive proceedings in Louisiana, whereby the petitioner in the case at bar was thoroughly and entirely emancipated from all disabilities, and her status fixed as a major in Louisiana, from which she claims the right to have her status recognized in other sovereignties.

So far we have traveled a broad and well-defined road, from which there is no variableness nor shadow of turning, every step of which is marked by well considered authority of the highest repute.¹

Under the view we take of the law governing this case, the petitioner has attained her majority under the laws of the State of her domicil, and this court, recognizing the status of capacity as thus fixed by the law of her domicil, will declare her of full age, so far as her right to demand and receive from any one having property in their possession belonging to her, to which she would be entitled upon attaining full age in this State.

In other words, being of full age in Louisiana, the State of her domicil, she is of full age in this State, under the principles of private international law obtaining in such cases.

Let the judgment be reversed, and the case remanded for further proceedings.

D'HERVAS v. BONNAR.

COURT OF CASSATION, FRANCE. 1833.

[*Reported Sirey*, 1833, I. 663.]

IN 1812 Mme. Willemiot, a Frenchwoman, married at Madrid M. d'Hervas, a Spaniard, and thus became a foreigner. Soon after their union, they removed to France, and there established themselves in business and acquired real estate.

On Nov. 9, 1820, Mme. d'Hervas became bound, jointly with her husband, as debtor to M. Bonnar for a sum of 100,000 francs, to secure which she mortgaged to him the estate of Beaugez, belonging to her.

The obligation not having been performed, M. Bonnar brought action against Mme. d'Hervas to obtain the land. She however alleged that the obligation was void, on the ground that by the Spanish law a wife cannot bind herself jointly with her husband, nor give security for him. M. Bonnar denied the application of Spanish law to

¹ The court proceeded to discuss the question of domicil. — Ed.

an obligation contracted in France by a Spanish woman domiciled there, and secured by goods situated in France.

The Tribunal of the Seine, June 4, 1827, dismissed the action. On appeal, the Royal Court of Paris reversed the judgment.¹ Appeal by Mme. d'Hervas, for violation of the principles as to statute personal contained in Articles 3 and 11 of the Civil Code.

THE COURT. It is not here a question either of the status of Mme. d'Hervas, or of any right guaranteed by a diplomatic convention between France and Spain, to the citizens of one country living in the other; but of the validity of an obligation assumed in France by a foreigner, who there had a domicile and landed property. In this affair the judgment could not have violated Art. 11 of the Civil Code, since that article secures to a foreigner in France the enjoyment of the same civil rights as are granted to Frenchmen by the *treaties* of the foreigner's nation.

Though Art. 3 declares that laws concerning the status and capacity of persons govern Frenchmen even while residing in a foreign country, it contains no similar or analogous provision in favor of foreigners residing in France; whence it results that the judgment appealed from could not have violated this article.

By the terms of the same article, immovables in France owned by foreigners are governed by French law; and in deciding that Mme. d'Hervas was held to execute an obligation which she had contracted under the authority of the French laws, with a mortgage on her land situated in France, the judgment made a proper application of the French laws which govern this obligation.²

MANAGER OF THE COURT THEATRE OF HANOVER v. G.

SUPREME COURT AT CELLE (HANOVER). 1846.

[Reported 13 *Seuffert's Archiv*, 102.]

THE singer Louise G. of Vienna on Nov. 9, 1840, with the assent of her mother (her pretended guardian), concluded an engagement with the Manager of the Court Theatre of Hanover. The singer G. afterwards refused to carry out the contract, and the Manager brought suit. The Austrian law, according to the Manager's contention, did not deprive of all effect the engagements of a minor entered into without the assent of her guardian; while according to the law of Hanover such engagements were null and void. The question therefore arose, by what law the legal capacity of a party to a contract must be judged.

¹ The judgment of the Royal Court, and the arguments in the Cassation, are omitted. — Ed.

² *Contra*, *Erambert v. Clerdent* (Liège, 31 Dec. '79), *Pasic. Belg.* 1880, 2, 122. — Ed.
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THE COURT. The rule must always be, that a court shall decide according to the law of the land. The exception to this rule, based solely on peculiar usage, according to which the minority of a foreigner is determined by the law of his domicile, cannot be extended in the decisions so as to cover the legal consequences of such minority. The effect of the defendant's agreement, attacked as the contract of a minor, is therefore to be determined by our law.

DE LIZARDI *v.* CHAIZE.

COURT OF CASSATION, FRANCE. 1861.

[*Reported Journal du Palais*, 1862, 427.]

M. DE LIZARDI, a Mexican, then over twenty-one years old, but still a minor by Mexican law, bought of Chaize, Rigaud, Delamarre and Bablin, in 1853 and 1854, jewels to a considerable amount, and in payment signed notes and bills of exchange. In 1857, having come of age by the law of his country, M. de Lizardi summoned M. Chaize and partners before the Tribunal of the Seine, to have declared void as made during minority all the obligations he had given them.

To this petition the defendants answered that at the time they dealt with him M. de Lizardi was of age by French law; that they were ignorant of his foreign nationality; that they contracted in good faith; and that the obligations were therefore binding. They also filed a cross-claim for the payment of the amounts he owed them.

The tribunal found for the defendants upon the original petition, and allowed the cross-claim. On appeal to the Court of Paris the judgment was affirmed.¹ The petitioner appealed.

THE COURT. Though the statute personal, the application of which to French citizens residing in a foreign country is assured by the French civil law, may on the principle of reciprocity be invoked by foreigners residing in France, yet it is proper in applying the foreign statute to enforce restrictions and limitations without which there would be constant danger of error or surprise to the prejudice of French citizens. Though on principle one is bound to know the capacity of the person with whom one enters into a contract, the rule cannot be so strictly and rigorously applied with regard to foreigners contracting in France. Civil capacity may in fact be easily verified in the case of transactions between French citizens; but it is otherwise as to transactions that take place in France between Frenchmen and foreigners. In such a case, the Frenchman cannot be held to know the laws of various nations, and their provisions as to minority and majority and the extent of the power of foreigners to make agreements within

¹ The judgments of the lower courts and arguments of counsel are omitted. — ED.

the limits of their civil capacity. It is sufficient for the validity of the contract that the Frenchman has acted without laches and negligence and in good faith.

It is not shown that the defendants knew the petitioner's foreign nationality when they dealt with him; it follows from the facts found in the lower court that in making sales to him in the regular course of business they acted in entire good faith; the price, though large, was not out of proportion to Lizardi's fortune; these things were delivered in presence of his relatives and without opposition on their part; from some of the objects sold the petitioner has realized a profit; nothing could lead the present defendants to suspect that Lizardi, though aged more than twenty-one years, was yet a minor by the laws of his country.

These facts, recited in the judgment, sufficiently justify the maintenance of agreements undertaken by Lizardi with the present defendants, and no law was violated by the judgment.

*Appeal dismissed.*¹

FOURGEAUD v. SANTO VENIA.

COURT OF PARIS. 1879.

[Reported 6 *Clunet*, 488.]

THE COURT. The fact is clear that Joseph, Count of Santo Venia, is of Spanish nationality; and at the time he accepted the drafts drawn on him by Thérèse Bimet (discounted by Fourgeaud, Simon Bugniet & Cie.) he was more than twenty-one years old, but a minor according to the Spanish law, his statute personal, which fixes the age of majority at twenty-five. The question is whether the Count of Santo Venia, who has accepted drafts in which he described himself as domiciled at Paris, can set up against *bona fide* holders his foreign nationality and his minority by the rule of his national law; and whether these *bona fide* holders were bound at their peril to ascertain the real capacity of the acceptor.

Though the laws which govern the status and capacity of persons follow those persons wherever they go, whatever be their domicile of origin, yet one must remember that the application of the foreign statute is subject to restrictions and limitations required by the legitimate interest of citizens of France who have become creditors by regular legal banking operations. Fourgeaud, Simon Bugniet *et* Cie. did not deal directly with the Count of Santo Venia; they dealt only with Thérèse Bimet,

¹ *Acc. Cussac v. Hartog* (Paris 1883), 10 *Clunet*, 290. In a similar case the Civil Tribunal of the Seine said: "It is a principle of natural law and of the public order of France that no one shall enrich himself at the expense of another; such a rule, like laws of police and of safety, bind, without distinction of origin or nationality, all who are on French soil." 14 *Clunet*, 178. — Ed.

his creditor. Though one may perhaps hold that Thérèse Bimet, who knew the Count of Santo Venia, was to blame for giving him credit in spite of certain facts which indicated his foreign nationality, the same blame cannot attach to bankers living far from Paris, who acted on information furnished them by the holder of the drafts, and by declarations as to domicile upon the drafts, and were therefore excusable for not having investigated a capacity which no particular fact or circumstance authorized them to suspect.

If one considers the greater interest of the security of a holder in dealing with commercial paper, a bill of exchange is sufficiently protected by holding that the bearer who has discounted the signature of a foreigner in ignorance of his quality and of the law which forbids him to contract has acted in good faith and with the degree of care which the nature of the contract requires.

It follows that the Count of Santo Venia is justified neither in law nor in fact in asserting the nullity of the obligation he has contracted.

A. v. C.

SUPREME COURT OF AUSTRIA. 1882.

[*Reported 13 Clunet, 468.*]

A., a Prussian, came of age, according to the Prussian law, on January 24, 1878, when she reached the age of twenty-one. She married C., an Austrian, August 25, 1879; and on October 19, 1880, at Prague, she accepted a bill of exchange. Being sued by A. on the bill, she alleged that at the time of the acceptance she had not reached the age of twenty-four, and accordingly was not of age by the Austrian law, nor capable of binding herself on a bill of exchange or negotiable note.

The lower court allowed the defence on the ground that she had become Austrian by marriage, and that one who becomes an Austrian submits himself to Austrian laws, and his capacity should be determined by those laws.¹

On appeal, the judgment was reversed, for the following reasons: The defendant had, as a Prussian, reached her majority on January 24, 1878; she then became capable of accepting a bill of exchange. She alleges that on her marriage with an Austrian this capacity ceased. It is true that she became an Austrian, but this fact could not deprive her of rights already acquired, and she should be considered as of age and capable at all times after January 24, 1878.

On appeal to the Supreme Court this judgment was confirmed.

¹ The text of the judgment is omitted.—Ed.

X. v. Y.

CIVIL TRIBUNAL OF THE SEINE. 1893.

[Reported 20 *Clunet*, 530.]

THE TRIBUNAL. The firm of X., ladies' tailors, delivered to Mrs. Y. between April and August, 1888, clothes and furnishings amounting to the sum of 404 francs. They brought suit for payment May 20, 1890.

The defendant, a Frenchwoman by origin, married at Paris in 1876 Y., an English merchant, then domiciled at P., and thereby became English. By the terms of their marriage contract the spouses adopted the system of community of goods, as established by the French Civil Code. Soon after the marriage, Y. moved his business and his residence to Paris. By a judgment of this Tribunal in 1889 a separation of goods was decreed between Mrs. Y. and her husband, and by a second judgment of May 6, 1890, they were divorced.

The plaintiffs claim, in the first place, that Mrs. Y. is liable to them in the action *de in rem verso*; or else by her personal undertaking made after the separation of goods to pay the debt in question; in the second place, that in any case Mrs. Y. being English should be bound by her national law, and might legally bind herself without her husband's consent by virtue of the English Act of August 18, 1882.

On the first point, there is no doubt that according to the French Civil Code Mrs. Y. would not be bound. So far as the action *de in rem verso* is concerned, the furnishings were made almost a year before the separation of goods, and therefore constituted a community debt, according to Articles 214 and 1409, § 5, of the Civil Code. Admitting that the defendant got the benefit of them, it was only as any married woman living with her husband with community of goods would get a benefit. The community, which Mrs. Y. gave up in 1889, would alone be bound. Regarding her personal undertaking to pay, by her card addressed to X. March 10, 1889, supposing the defendant wished to make a personal undertaking, the agreement was null for default of authority from her husband. By virtue of the principles laid down in Articles 217 and 1449 of the Civil Code, a wife after separation of goods can contract without her husband's authority only within the limits of a wise administration; and one could not claim that this contract would fall within such limits, since, in undertaking to pay a debt for which she was not bound, according to the principles of our law, Mrs. Y. would have done an act without consideration, a pure gratuity.

On the second point, it is generally agreed that foreigners in France are governed, so far as concerns their civil status and capacity, by their national law. If this principle is not expressly laid down in any text of the law, it follows by implication from Article 3 of the Civil Code, which assumes the principle of the preponderance of the national law as regards personal condition; and having imposed on foreigners

the French law in matters of police and safety, and with respect to their immovables, remains silent as to their status and their civil capacity. . . . By the terms of Articles 1 and 2 of the English Act of August 18, 1882, altering the law as to the property of married women, a married woman may contract as if she were sole, so as to bind her separate estate, and may be sued either in contract or in tort in all respects as if she were sole. Article 44 of the same Act provides that every contract made by a married woman so as to bind her separate estate will bind not only her separate estate at the date of the contract but all after-acquired estate.

To avoid the consequences of this law, Mrs. Y. urges (1) that the French jurisprudence applies to foreigners the rules of their statute personal only so far as the national law of the foreigners does not remit them, as to their status and capacity, to the law of the country where they are domiciled; and that in fact English law remits Englishmen to the law of their domicile: (2) that in adopting the French system of community she has renounced her national law, at least so far as her capacity is concerned, and the authority of her husband is therefore necessary.¹

As to the first objection, the principle of Conflict of Laws that the defendant sets up as being the English law is not certain. In England, in fact, the Conflict of Laws is not the subject of positive statutory regulation, but depends on the "Common law," that is, on customary law, which is interpreted and moulded from day to day by jurisprudence. The English courts when dealing with conflicts between the English law and foreign laws in matters of status and personal capacity have a variable doctrine. Having allowed preponderance to the law of the act, they incline in fact to substitute for it in practice the law of the domicile; but this is no more than a present tendency of English jurisprudence toward a doctrine, a tendency which cannot be characterized as the law of England. But were this rule certain, we could not accept the remission by the foreign law to the law of the domicile. In deciding that the law applicable to the status and capacity of foreigners in France is their national law, the French legislator considers that since the status and capacity of persons are dependent strictly on their national characteristics, that law is better calculated than any other to appreciate the conditions whence the rule of law is derived; and that such law should be followed from high motives of reason and justice. But in adopting this principle, the legislator does not have in view the rule of international law in force in this case in the foreign system of law; since the French law itself, in the exercise of its sovereignty, establishes the rule, and solves the conflict of French law with foreign laws, providing that foreigners shall be governed while in France by their statute personal, and directing the French judges to apply to them their national law. This is an imperative rule, to which

¹ Part of the opinion, in which this second objection is held unfounded, is omitted. — ED.

conformation has become necessary ; and we cannot substitute for it the different conception of a foreign system of law which attaches more importance in such a matter to the domicile than to the nationality. It follows that in this case the law applicable to the capacity of Mrs. Y. is the English Act of 1882, relative to the capacity of married women ; and by virtue of this law the defendant legally bound herself without her husband's authorization. . . .

REYNAUD *v.* MARTEL.

COURT OF APPEAL OF GRENOBLE. 1892.

[*Reported 19 Clunet, 1143.*]

THE COURT. Peter Clapier was on June 18, 1891, condemned by the Court of Assizes of Gap to five years' imprisonment at hard labor for a rape. According to the provisions of article 29 of the Penal Code the condemned is under legal interdiction as long as his punishment lasts ; and Maître Martel, notary at Serres, has been appointed his guardian. This interdiction, which deprives the condemned of the use and administration of his property, is complementary to the principal punishment ; by the terms of the law, punishment at hard labor necessarily involves the accessorial punishment of legal interdiction.

By the terms of Art. 8 of the Civil Code, laws of police and safety bind all inhabitants of French territory ; Clapier, an Italian subject, but condemned in France for a crime committed on French territory, is bound by the French repressive laws. Although the laws which create the statute personal of foreigners govern them in France, this rule extends only to civil laws ; the safety of society requires that the criminal laws of France should bind all who inhabit French territory. Whatever the provisions of the Italian Code, Clapier, on his condemnation to five years' imprisonment with hard labor in France, is subject by the French penal code to the accessorial punishment of legal interdiction while the principal punishment lasts.

The interdicted individual cannot himself appear in the action for damages brought against him by Reynaud, his victim's father ; and the plaintiff has rightly brought the action against the guardian, Maître Martel, who is his legal representative.

CUMMING v. CUMMING.

COURT OF APPEAL OF PARIS. 1895.

[Reported 23 *Clunet*, 147.]

THE Widow Cumming applied for a *conseil judiciaire* for her son William Cumming, by reason of his prodigality. The Tribunal of the Seine dismissed the application, and the plaintiff appealed.

THE COURT. As a result of the general principles of law and of the provisions of Art. 3 of the Civil Code,¹ foreigners living in France are governed by their national law in all that concerns their status and personal capacity. The rule that the statute personal follows the person is a rule of public order which binds French judges in the case of conflicts between different systems of law. It is not proved by any written law or by sufficiently trustworthy documents that according to the English law the status of persons domiciled abroad is governed not by the statute personal, but by the law of the domicile, to the exclusion of that of the allegiance; but even if such a rule exists, it could be applied, according to the evidence, only when the foreigner had definitively fixed his domicile in France *animo manendi*. Though Cumming established himself in business in France, it is not proved that he had abandoned the intention to return; he did not apply to be admitted to the enjoyment of civil rights, but on the contrary preserved and in all circumstances maintained his nationality of origin; he therefore remains subject to his national law in everything that concerns his personal status. The English law does not recognize the institution of the *conseil judiciaire*. Therefore, without going into the case on the merits, the court declares the Widow Cumming unable to maintain her application, and orders her to pay costs of the original application and of the appeal.

¹ "Laws of police and of safety bind all inhabitants of the territory. Immovables, even those in the possession of foreigners, are governed by the law of France. Laws concerning personal status and capacity bind Frenchmen, even while residing abroad." — ED.

SECTION III.

MARRIAGE.

DALRYMPLE v. DALRYMPLE.

CONSISTORY COURT OF LONDON. 1811.

[Reported 2 Haggard Consistory, 54.]

THIS was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a Scotch marriage, *per verba de præsenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland than as quartered with his regiment in that country.

SIR WILLIAM SCOTT.¹ The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the court has to acknowledge great obligations to the gentlemen, who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland. . . .

The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion. *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the

¹ Part of the opinion is omitted. — Ed.

general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge, and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult, living in a civil capacity, and with an established domicile in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction, in any ignominious meaning of the word; for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favor as it does the most public. It depends likewise entirely upon the law of the country whether it is justly to be styled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point? . . .

I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto et ipso jure*, constitute the relation of man and wife. . . . When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract.¹ . . .

¹ The court, upon examining the evidence, held that in this case a marriage had taken place according to the Scotch law. — Ed.

Little now remains for me but to pronounce the formal sentence of the court; . . . and I think I discharge that duty in pronouncing that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this court that he has so done, by the first Session of the next Term.¹

IN RE LUM LIN YING.

UNITED STATES DISTRICT COURT (DISTRICT OF OREGON). 1894.

[*Reported 59 Federal Reporter, 682.*]

BELLINGER, J. It is admitted that the person claiming to be the husband of the petitioner is a merchant doing business in this city. Is the petitioner his wife? He testified that she was betrothed to him at two years of age, and that six months ago the marriage was solemnized according to the laws of China. He further testified that he had never seen his wife until her arrival here. Upon this last statement, I concluded to remand the petitioner, without further inquiry, but deferred to the urgent request of her attorneys to be heard as to this alleged China marriage, and as to the *bona fides* of the marriage transaction.

The only authority cited as to what constitutes the solemnization of marriage under Chinese laws is an article in the Encyclopedia Britannica by Prof. R. K. Douglas, professor of Chinese in King's College, London. According to this authority, marriage in China is an arrangement with which the parties most concerned have nothing to do. The duty of filial piety is said to be the final object of Chinese religious teaching, and, under its influence, parental will is a supreme authority, from which there is no appeal. Marriage, therefore, is not the result of acquaintanceship. "The bridegroom rarely sees his betrothed until she has become his wife." The preliminaries are entirely arranged by professional go-betweens with the parents and families of the respective parties. The correspondence between the two, thus conducted, is in writing, and is of the briefest character. If the arrangements proceed satisfactorily, the particulars of the engagement are committed to writing upon duplicate cards. These are sewn together, and the ceremony is complete. The bride journeys to the home of her husband, who may then see her for the first time. This is the system under which the marriage relied upon in this case is claimed to have taken place,

¹ Upon successive appeals, the Court of Arches and the Court of Delegates affirmed the sentence of the Consistory Court.

Acc. *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395; *Brinkley v. A. G.*, 15 P. D. 76; *McDeed v. McDeed*, 67 Ill. 545; *Smith v. Smith*, 52, N. J. L. 207; *S. v. Patterson*, 2 Ire. 346; *Phillips v. Gregg*, 10 Watts, 158. — ED.

and is consistent with such marriage. The fact that such a marriage did take place, as testified to by the parties, is not contradicted, and is consistent with all the circumstances appearing in the case.

If the parties were married according to the laws of China, such marriage is valid here. Parsons on Contracts says that "it seems to be generally admitted, and is certainly a doctrine of English and American law, that a marriage which is valid in the place where it is contracted is valid everywhere. The necessity and propriety of this rule are so obvious and so stringent that it can hardly be called in question." This rule is subject to the qualification that a marriage made elsewhere would not be acknowledged as valid in a State, the laws of which forbade it as incestuous. Meyer's Federal Decisions says the general rule is undoubtedly that a marriage good by the law of the place of solemnization is good everywhere.

At the time of the marriage in question in this case, the husband was domiciled in the United States. This raises a question, as to whether China is the place of solemnization of the marriage. While the place of solemnization governs, by what rule shall such place be determined, when the parties are at the time within different jurisdictions? It is doubtful whether this is a China marriage. It is not enough, in my judgment, that such a marriage is valid under the laws of China. I am of opinion that it must not only be valid under such laws, but, to be valid elsewhere, must have been solemnized within the jurisdiction of those laws.¹

NORMAN v. NORMAN.

SUPREME COURT OF CALIFORNIA. 1898.

[Reported 121 California, 620.]

CHIPMAN, C. Action to have a certain marriage between plaintiff and defendant declared valid and binding upon the parties. A second amended complaint alleged that on August 2, 1897, defendant was a minor of the age of fifteen years and ten months, and that her father, one A. C. Thomson, was her natural and only guardian; plaintiff was of the age of twenty-one years and ten months, and that both plaintiff and defendant were citizens and residents of Los Angeles County, California; on said day plaintiff and defendant, at Long Beach, on the coast of California, boarded a certain fishing and pleasure schooner of seventeen tons burden, called the "J. Willey," duly licensed under the laws of the United States, of which W. L. Pierson was captain,

¹ Upon the evidence, the court held that the petitioner "does not belong to any class of persons within the exclusion acts of Congress," and therefore ordered her discharge, without deciding the question as to marriage. See *Rep. v. Li Shee*, 12 Hawaii, 329. — ED.

and was enrolled as master thereof, and had full charge of said vessel; said vessel proceeded to a point on the high seas about nine miles from the nearest point from the boundary of the State and of the United States; the parties then and there agreed, in the presence of said Pierson, to become husband and wife, and the said Pierson performed the ceremony of marriage, and among other things they promised in his presence to take each other for husband and wife, and he pronounced them husband and wife; neither party had the consent of the father or mother or guardian of defendant to said marriage; on the same day and immediately after said ceremony the parties returned to the county of Los Angeles, and have ever since resided there, and they then and there immediately began to live and cohabit together as such husband and wife, and continued so to do until the tenth day of August, 1897; said marriage has never been dissolved; defendant denies the validity of said marriage and refuses to join in a declaration thereof.

Defendant, by her guardian *ad litem*, admits the allegations of the complaint, and alleges that in having the ceremony performed as alleged plaintiff and defendant did so with the intent and for the purpose of evading the statutes of the State prescribing the manner in which marriages shall be contracted and solemnized. She prays that the said pretended marriage be declared illegal and void, and that plaintiff be precluded and estopped from ever setting up or asserting or claiming to be the husband of defendant. The court found all the allegations of the complaint and answer to be true, and as conclusion of law found that plaintiff was not entitled to the relief claimed, but that the said pretended marriage was illegal and void, and judgment was entered accordingly.

The appeal is from the judgment. The action is brought under section 78 of the Civil Code. It must be conceded that the question presented by this appeal is one of much importance, whether viewed in its relation to society or to the parties only.

Appellant contends: 1. That the marriage is valid because performed upon the high seas; and 2. That it would have been valid if performed within this State, because there is no law expressly declaring it to be void. Respondent presents the case upon two propositions, claiming: 1. That no valid marriage can be contracted in this State except in compliance with the prescribed forms of the laws of this State; and 2. That citizens and domiciled residents cannot go upon the high seas for the avowed purpose of evading the law of this State, and contract a valid marriage.

Sections 722, 4082, and 4290 of the Revised Statutes of the United States are cited by appellant as recognizing marriages at sea and before foreign consuls, and that section 722 declares the common law as to marriage to be in force on the high seas on board American vessels. We have carefully examined the statutes referred to and do not find that they give the slightest support to appellant's claim.

the law of the sea, as it may relate to the marriage of citizens of the several States domiciled in California, cannot be referred to the common law of England any more than it can to the law of France or that of any other foreign country. We can find no law of Congress, and none has been pointed out by appellant, in which the general government has undertaken or assumed to legislate generally upon the subject of marriage on the sea. Nor, indeed, can we find in the grant of powers to the general government by the several States, as expressed in the national constitution, any provision by which Congress is empowered to declare what shall constitute a valid marriage between citizens of the several States upon the sea, either within or without the conventional three-mile limit of the shore of any State; and clearly does no such power rest in Congress to regulate marriages on land except in the District of Columbia and the territories of the United States, or where it possesses the power of exclusive jurisdiction. We must look elsewhere than to the Acts of Congress for the law governing the case in hand. Section 63 of the Civil Code provides as follows: "All marriages without this State, which would be valid by the laws of the country in which the same were contracted, are valid in this State." The parties in the present case were residents of and domiciled in this State and went upon the high seas to be married with the avowed purpose of evading our laws relating to marriage. It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, said: "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here." This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, by the same learned jurist. See, also, as to marriages in evasion of the law of the domicile of the parties, *Bishop on Marriage and Divorce*, § 880 *et seq.* If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time and went to the place where they attempted to be married for the purpose of evading our laws which they believed forbade the banns. But the parties did not go to any other State or country to be married. They went upon the high seas where no written law, of which we have any knowledge, existed by which marriage could be solemnized. The rule, therefore, that the law of the place must govern does not operate, because there was no law of the

place unless we may hold that the law of the domicil applies. The question presented is *res integra*, so far as we have been able to discover; and no case in England or the United States or elsewhere has been found by counsel (and their briefs disclose much research and industry) holding that the code rule *supra*-applies to such a marriage as this. In the case of *Holmes v. Holmes*, 1 Abb. (U. S.) 525, the question was whether a marriage had been contracted under the laws of California or Oregon. It seems that the parties, who were domiciled in Oregon, met in San Francisco and there took passage on the steamer for Portland. It was at the trial suggested that the marriage might have taken place on board this vessel when on the high seas. There was no evidence that the parties ever met elsewhere except in California and Oregon. In the opinion by Deady, J., it was said, after showing that there was no valid marriage under the laws of either of these States: "Nor do I think that citizens of this State [Oregon], as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another State — as at sea — and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the State is subject and owes obedience, and ought not to be held valid by them." It is said by appellant that this expression of opinion is but dictum, inasmuch as the question did not necessarily arise. This may be true, but it commends itself to our judgment as wise and sound upon reason and principle. We find no case holding that parties domiciled in a State may, for the avowed purpose of evading its laws, go where no law exists and there consummate marriage in violation of the laws of their domicil, and immediately return and claim a valid marriage. In all the cases where the statutes have been thus circumvented it was accomplished by a marriage valid in the place where celebrated. The Gretna Green marriages of Scotland between citizens of England are notable examples, and they were upheld by the ecclesiastical courts. But these marriages were solemnized in accordance with the laws of Scotland, and therefore had legal sanction; and so also marriages in this country of citizens of one State going into another to avoid some disqualification prescribed in the law of their domicil.

It has been properly held that, as marriage is a natural right of which no government will allow its subjects, wherever abiding, to be deprived, if the parties happen to be sojourning in a foreign country, and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms and it will be recognized at home as good. Bishop on Marriage and Divorce, § 890 *et seq.* But this author says: "In reason, for we have probably no adjudications of the question, a marriage void by the law of the place of its celebration, in a case where such law provides no valid method, would not be made good by the rule we are considering if the parties went there simply to avoid compliance with the law of their domicil.

There was no necessity; for their own law was open to them at home, and it would not assist them in eluding its inhibitions." And he refers to the case of *Holmes v. Holmes*, *supra*, remarking: "It would, perhaps, be the same also where the resort was, for the like purpose, to an uninhabited region of the high seas." In the case before us, the parties not only went where there was no law authorizing the marriage, but they went with the intention of immediately returning to their domicile where they supposed the law would not admit of their marriage, to enjoy the fruits of their contract. There was no necessity upon the parties to do this suddenly arising, or arising from unexpected surrounding circumstances, but the circumstances were of their own creation and for a purpose to evade the law of their home. There is, we conceive, no ground of expediency, sound policy, or good morals upon which the transaction can be given legal sanction. In summing up the doctrine Mr. Bishop says (Bishop on Marriage and Divorce, § 920): "Therefore the rule necessarily is, that whenever a marriage is entered into, so that the laws of one country take cognizance of it, it will be accepted as a marriage in every other country also; on the other hand, no forms matrimonial which come short of constituting valid marriage in the one country will so bring it within the cognizance of international law as to make it valid elsewhere." We think it results from considerations of reason and principle that unless it appears that this marriage was consummated under some recognized law the courts of this State should not declare it valid; and we think the burden is upon appellant to show such a law, failing in which his suit must fail. The authorities are many to the point that the party who relies upon the foreign law, or law of another State, must prove the law by its production. Stewart's Marriage and Divorce, § 119, cases cited.

Respondent cites the case of *Crapo v. Kelly*, 16 Wall. 610, where it was held that, in the case of an assignment in insolvency in the State of Massachusetts, it carried with it a vessel then in the Pacific Ocean; and in an elaborate opinion it was shown that, except for the purposes and to the extent that certain attributes have been transferred to the United States by the several States of the Union, each possesses all the rights and powers of a sovereign State, and that the vessel in question was a part of the territory of the State of Massachusetts, although at the time in the Pacific Ocean, and that the laws of Massachusetts would govern the assignment. It is hence argued by respondent that the law of the domicile in the present case should govern. There is much force in this position, but we do not deem it necessary to place our decision on that ground. We think the law of the domicile of the parties must be the law by which to judge the validity or invalidity of this marriage upon the grounds already stated.

We are thus brought to the only remaining question: Was the marriage valid tested by the laws of California?

If this marriage can be upheld, it must be upon the sole ground that

there was mutual consent, solemnization by a sea captain, and subsequent cohabitation as husband and wife for the space of eight days. What constituted marriage in this State, prior to the amendments of the code in 1895 and 1897, has been pretty well settled and need not be restated here. In the light of the history of past litigation, it ought not to be difficult to determine what is a valid marriage under existing law. Section 55 of the Civil Code, as amended in 1895, provided as follows: "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code." No particular form of solemnization is required, "but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife." Civ. Code, § 71.

Section 70 of the Civil Code provides as follows: "Marriage may be solemnized by either a justice of the Supreme Court, judge of the Superior Court, justice of the peace, priest, or minister of the gospel of any denomination." Prior to the amendment of 1895 the consent to marriage was required to be followed either by "a solemnization, or by a mutual assumption of marital rights, duties, or obligations." Civ. Code, § 55. The amendment added the words "authorized by this code" after the word "solemnization" and struck out the words above in italics.

It seems to me that the intention of the legislature is plainly declared that consent must be followed by such solemnization as is authorized by the code or there can be no valid marriage; and that this solemnization can only be performed by the persons mentioned in section 70, *supra*, for no other persons are so authorized. Prior to 1895 section 75 of the Civil Code provided for marriages by declaration without the solemnization required by section 70, but the act of March 26, 1895, swept away that easy process of marriage. Section 68 of the Civil Code was also amended in 1895 in an important particular. It now reads: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but noncompliance with its provisions *by other than the parties to a marriage* does not invalidate that marriage." The words in italics were added to the section as it formerly stood, and would seem to imply that, while there may be non-compliance with the law by parties other than those seeking marriage, there cannot be by the latter. Section 76 of the Civil Code now, as heretofore, makes provision for supplying the evidence of marriage where no record of the solemnization is known to exist; and a form of written declaration is prescribed. A new section, 79½, was added to the Civil Code in 1897, which provides that "the provisions of this chapter, so far as they relate to procuring licenses and the solemnizing of marriage, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation." . . . Section 69 of the Civil Code provides that:

"All persons about to be joined in marriage must first obtain a license therefor from the county clerk." . . . In this case there was no license, there was no solemnization by any person authorized by law to perform the ceremony, there was no marriage under section 79½. To recognize such a marriage we think would grossly violate the spirit and letter of our statute and be a blot upon the civilization we profess. To give the law any just interpretation we must hold that, subject to the exception mentioned in section 79½, section 55 requires not only the consent of parties capable of making a contract of marriage, but that that consent must be followed by a solemnization authorized by the code, and this solemnization can only be performed by the persons named in section 70. We do not think it necessary to decide whether it is mandatory to obtain a license; nor whether the minority of the defendant and want of consent of her parents or guardian would invalidate the marriage. Our conclusion rests upon the want of any authorized solemnization and would be the same if the parties were both of full age. We recommend that the judgment be affirmed.¹

SIMONIN v. MALLAC.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. 1860.

[*Reported 29 Law Journal, Probate, 97.3*]

THIS was a petition by Valérie Josephine Wilhelmine Simonin (falsely called Mallac), for a decree of nullity of marriage. The petitioner, a Frenchwoman, was living, in 1853, in Paris with her mother; she became acquainted with Léon Mallac, a Frenchman, who made an offer of marriage, which she accepted. In 1854 the parties came to London and were there married in due form. Léon Mallac was then of the age of twenty-nine years, and the petitioner twenty-two. The consent of Mallac's father had not been obtained. The marriage was not consummated, and the parties returned to Paris. Mallac afterwards refused to marry the petitioner in France. She then instituted before the Civil Tribunal of the Seine a suit to procure a decree of nullity of the pretended marriage. On December 1, 1854, a decree was made, of which the following is the substance.

A marriage abroad between French subjects must be preceded by publication in France, according to Article 63 of the Code Napoléon; and the provisions of Articles 144 and following must be complied with. If these formalities are omitted with the express intention of evading the law the marriage is to be pronounced null. The marriage

¹ See *Kent v. Burgess*, 11 Sim. 361; *R. v. Brampton*, 10 East, 282; *Calling v. Culling* [1896], Prob. 116; *Davis v. Davis*, 1 Abb. N. C. 140; *Phillips v. Gregg*, 10 Watts, 158. — Ed.

² 2 Sw. and Tr. 67, s. c. — Ed.

in question was celebrated without the parties having obtained or sought the consent of their parents, and without having been preceded in France by the prescribed publication. The parties went to England only for the moment, and returned to France directly after the ceremony; and they acted thus with the formal intention of evading the prescriptions of the French law. The marriage has not been consummated. On these grounds the Tribunal declares the pretended marriage null.

The important provisions of the Code Napoléon (Articles 148, 151-154, 183) are as follows.

No man under twenty-five and no woman under twenty-one can contract a valid marriage without the parents' consent. Persons who have passed these ages respectively must before marrying ask advice of their parents by an *acte respectueux et formel*. If the man is under thirty or the woman under twenty-five, this *acte* must be repeated each month for three months; and at the end of the fourth month the marriage may take place. If the parties are above these ages respectively the *acte* need not be repeated, and the marriage may take place at the end of a month. Parents whose consent has not been asked cannot impeach a marriage after they have expressly or tacitly approved it, or after a year has passed since they knew of it. A party to the marriage cannot impeach it if a year has passed since he reached the age of full consent.

The petitioner came to England in 1857 and has since that time resided here with no intention to return to France.¹

Dr. Phillimore and *Dr. Swabey*, for the petitioner. We contend that the incapacity to contract a marriage follows the individual everywhere as a *qualitas personalis*; and this view is upheld by a most important decision recently pronounced on the subject.

[THE JUDGE ORDINARY. — The application of *Brook v. Brook* to this case is, that the marriage is void in France, not that it is void in England. KEATING, J. — *Brook v. Brook* does not decide that the marriage in question was bad at Altona. The JUDGE ORDINARY. — Could a foreigner, by the laws of his own country a minor till twenty-five, plead in infancy here to a bond executed at twenty-two?]

I apprehend not.

[The JUDGE ORDINARY. — Then, could a foreigner, capable of marrying by his municipal law, but incapable by ours, contract a valid marriage here?]

SIR CRESSWELL CRESSWELL, JUDGE ORDINARY. This state of facts presented two very important questions for our consideration: first, whether this court has any jurisdiction over Léon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnized is to be held null and void. We had the advantage of a learned argument

¹ This statement of facts is condensed from that of the Reporter. Part of the argument of counsel is omitted. — ED.

on behalf of the petitioner, and feel that the responsibility cast upon the court is greatly increased by the want of any such assistance on the other side. The argument in favor of the jurisdiction of the court was rested on the ground, first, that the contract was made in England, and that the court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute (4 Geo. IV. c. 76), and that the tribunals *loci contractus* have, generally speaking, cognizance of the contract; secondly, that England is now the domicile of the petitioner, but that assertion begs the main question in dispute, for if the marriage be valid it is not her domicile; thirdly, that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the court. The 42d section of the statute 20 & 21 Vict. c. 85, by which this court was established, removes all objection on the ground of the citation having been served without Her Majesty's dominions, but, in our opinion, would not of itself suffice to give to the court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question, therefore, depends upon the first proposition, that the parties by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal. Huber, 65. tit. 1, De Foro Competente, § 5, says, "Sequitur causa fori tertia quam rem gestam esse diximus eamque vel e contractu vel ex delicto admissa." In another place he adds, "Si reus illic haberi posset"; and the same doctrine is to be found in John Voet, Boullenois, Donellus, and Story. The Common Law Procedure Act (15 & 16 Vict. c. 76), § 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and section 42 of the 20 & 21 Vict. c. 85, already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicile. There is nothing contrary to natural justice in calling upon him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for, according to Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hag. Cons. 61, "It is an indisputable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country; if he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party." We think, therefore, that this court is competent to entertain the present suit, and to adjudicate upon the petition presented by the party calling herself Valerie Simonin, which prays the court to decree that the pretended form or ceremony of marriage had between the petitioner and Léon Mallac was and is

void and of no effect in law whatsoever. This, which is the second question to be determined, is, no doubt, of the gravest importance, and, as far as this court has been able to ascertain, *primæ impressionis*. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own, in the attempt to discover precedents for our guidance. The question is this, — Whether a marriage duly solemnized in England, in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void, because the parties to that marriage being foreigners contracted it in England in order to evade the laws of the country to which they belonged, and in which they were domiciled? It may, indeed, be doubted whether the evidence of the petitioner established the intention to evade the law of France, and whether that which the witness Auguste Noël called a Statute of Limitations, viz., section 183 of the Code Napoléon, did or did not operate to bar the right of the petitioner to institute this proceeding four years after the marriage was solemnized. But we pass over those points in order to deal with the broad and important question that has been raised. It was contended that the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with them everywhere, and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was not absolute, but conditional only; and a contract made by them would be good unless they came here with the intention to evade the law of France. So, a contract made here would be unimpeachable if ratified by the subsequent assent of the parents, and a contract made here would be perfectly valid, unless impeached within a certain time; and, therefore, a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-one, without attending to the formalities prescribed by the Code Napoléon, 151, 152, 153, and 154, may receive a different consideration from one absolutely prohibited by Article 148, by parties respectively under those ages. But taking the decree of the French court in the suit there instituted as evidence that, by the law of France, this marriage was void, we again come to the broad question, — is it to be judged of here by the law of England, or the law of France? In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage, but that parties are, with reference to them, bound by the law of their domicil. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations; but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it

is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained, as a general rule, by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz., marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, *e. g.*, by our Royal Marriage Act. Story, in his *Conflict of Laws*, § 113, a, mentions, as a third exception, "Those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country." In several instances, learned judges presiding in our ecclesiastical courts have stated the general rule without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But inasmuch as none of the cases referred to fell within the exceptions above mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it. In addition to the writings of jurists as to the existence of such a general rule, by the law of all civilized nations, we find that in several cases it has been adopted by the courts of this country as the ground of their decisions.

I believe the earliest of them was *Scrimshire v. Scrimshire*, decided by Sir E. Simpson in 1752, and reported 2 Hag. Cons. 395; for that learned judge then said it was a case of *primæ impressionis*. The judgment is of great value, from the full manner in which he dealt with the principles on which the court should proceed in adjudicating upon such cases. The parties were British subjects domiciled in England. It was a suit for restitution of conjugal rights. The respondent pleaded that the marriage was celebrated in France; set forth circumstances under which that celebration took place, and averred that, by the laws of France, the marriage was null and void. Sir E. Simpson, after disposing of one or two preliminary points, observed: "The general questions are two: first, whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage in such manner as the laws of this country would deem to constitute marriage, if there was nothing else in the case but a question on the fact of the marriage. Secondly, whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated and pronounced to be good, being solemnized in France, where by law it is null and void to all intents and purposes? For it seemed to be admitted in the argument that the law was so, but insisted that it ought not to be a rule of determination in this cause." The first point he determined in the affirmative, and would have held the marriage valid had it been agreeable to the laws of France, where it was cele-

brated. "But," he proceeds, "the great difficulty arises on the second question, from the marriage being celebrated in France, where such marriage is null by the law of France." He afterwards says, "The only question before me is, whether this is a good or bad marriage by the laws of England, and I am inclined to think that it is not good. On this point, I apprehend it is the law of this country to take notice of the laws of France or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed according to that law." He then quoted several passages from Sanchez, J. Voet, and others, showing that if subjects of a country where clandestine marriages are prohibited go to another country, where there is no such prohibition, and celebrate a clandestine marriage there, it is to be held good; and the converse is established by the same authorities. He sums up the effect of the books referred to in these words: "These authorities fully show that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and, by the common consent of nations, has been so received." In many instances, judges have used similar language with reference to cases where the form and ceremonial of the marriage were alone in question; and it can hardly, in such cases, be presumed that they intended their words to bear a more extensive sense than was necessary for the question then before them; but the sense ascribed by Sir E. Simpson to these passages extends to the clandestine character of the marriage, and not merely to the form of the contract or ceremonial. He then explains in the clearest manner the principle on which courts have proceeded in holding that marriages are to be considered according to the law of the country in which they are celebrated: "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion which must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries — that is, the law where the contract is made. By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not." The same rule was recognized and made the ground of the judgment of Sir W. Wynne in *Middleton v. Janverin*, 2 Hag. Cons. 487; nor is their reasoning weakened by the fact that certain exceptions out of that rule have been generally recognized,

viz., where marriages deemed contrary to the law of religion and morality, and contrary to the settled policy of a nation, have been contracted abroad, and held void in the country of which the parties were domiciled subjects, and where such a marriage would not be allowed. It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of the country where a marriage has been solemnized in conformity with the laws of that country should hold it void, because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. There is a passage in Huber, *Prælectiones Juris Civilis*, lib. 1, tit. 3, 'De Conflictu Legum,' on this subject which ought to be noticed. After discussing contracts made in foreign countries, in section 8 he proceeds: "*Matrimonium pertinet etiam ad has regulas si licitum est eo loco ubi contractum et celebratum est ubique validum erit effectumque habebit sub eadem exceptione prejudicii aliis non creandi; cui licet addere si exempli nimis sit abominandi ut si incestum juris gentium in secundo gradu contingerit alicubi esse permissum quod vix est ut usu venire possit.*" And he proceeds to say, that if parties go to a country where such a marriage is tolerated, and celebrate it there, and return to their own country, it will not be recognized: "*Quia sic jus nostrum pessimis exemplis eluderetur eoque pertinet hæc observatio. Sæpe fit ut adolescentes sub curatoribus agentes furtivos amores nuptiis conglutinare cupientes abeant in Frisiam Orientalem aliave loca in quibus curatorum consensus ad matrimonium non requiritur juxta leges Romanas, quæ apud nos hæc parte cessant, celebrant ibi matrimonium et mox redeunt in patriam. Ego ita existimo hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse magistratus hic obligatos e jure gentium ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium scientes volentes impertiunt.*"

Now this passage is remarkable. Huber discusses the two exceptions out of the general rule that marriages good where celebrated, are, by the law of nations, to be acknowledged everywhere, incestuous marriages and marriages of minors without consent *curatorum*, celebrated in countries whither they have gone for the purpose of evading the laws of the country of their domicile; and he does not suggest the slightest doubt as to either class being held good in the country where solemnized; but, with reference to the second class, vindicates the country of the domicile against the charge of violating the law of nations by refusing to recognize them. Story is, I believe, the only writer who has expressed an opinion on this point; and he, after mentioning that France has ventured on the doctrine that the marriages of Frenchmen under such circumstances shall not be deemed valid, adds, "There can

be little doubt that foreign countries where such marriages are celebrated, will follow their own law, and disregard that of France." Conflict of Laws, § 90. The question appears to have occurred to Lord Meadowbank, a judge of great eminence; for in the note of his opinion annexed to his interlocutor of remit, in the case of *Gordon v. Nye*, Ferg. Cons. Rep. 361, he puts this question, "Or would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and, of course, incapable by the law of that country of contracting marriage?" — plainly intimating his own opinion that they would not. In this country marriages have been solemnly recognized as valid, although celebrated in Scotland between English domiciled minors, without the consent required by the Marriage Act, 26 Geo. II., to which country they had resorted for the purpose of evading the operation of that act. I allude to the case of *Compton v. Bearcroft*. In a note to the report of *Middleton v. Janverin*, 2 Hag. Cons. 444, the libel in that case is set out, in which "the minority of the lady, the want of consent, the English domicil, and the Marriage Act were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day." The prayer was, that the marriage might be declared null and void, pursuant to the said act for clandestine marriages. The libel was rejected. The court, therefore, must have held, that if all the matters alleged were proved they would not supply a ground for declaring the marriage null.

It has been said that the parties did not in that case evade the Marriage Act, for that it contains an express exception of marriages solemnized in Scotland. It is true that marriages of minors in Scotland, without consent, are not prohibited by the Marriage Act, and therefore they cannot be said to be contrary to the law of England. But there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton v. Bearcroft* is, therefore, an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England. The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law.

Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions their own nation only must bear the blame. But what right has one independent nation to call upon any other nation, equally independent, to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any

such right it must be found in the law of nations, that law "to which all nations have consented or to which they must be presumed to consent, for the common benefit and advantage." Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent whether both parties are French, or one only. Assume, then, that a French subject comes to England, and there marries without consent a subject of another foreign country, by the laws of which such a marriage would be valid, — which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know, and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that, in the case now before the court, both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences. The cases put are, therefore, a fair test as to the possibility of maintaining that, by any *comitas* or *jus gentium*, this court is bound to adopt the law of France as its guide. Huber, indeed, in the passage cited, after vindicating the refusal to acknowledge a marriage solemnized abroad between parties who have gone there to evade the law of their own country, proceeds: "Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii sua facilitate jus patriis legibus contrarium *scientes volentes* impertiuntur."

It is somewhat difficult to ascertain what Huber would require to be done by foreigners in order that they may be exempted from his reproach. He assumes that they are *scientes*. Is it intended that they are to inquire and ascertain whether the law of any foreign nation will be evaded if the proposed marriage is solemnized? Is the domicile of the parties and the law prevailing there to be investigated? Are the parties to be called upon to prove their ages, consent of certain relations or the non-existence of such relations, or that they have not come to this country to evade the laws of their own? Are the clergy of this country to be deemed *scientes* that a foreign law is about to be evaded, unless they have proof to the contrary? Unless that proposition can be established the reproach of violating the law of nations cannot attach to this country if such marriages are here celebrated. The great importance of having some one certain rule applicable to all cases — the difficulty, not to say impossibility, of

having any rule applicable to all cases, save that the law of the country where the marriage is solemnized, shall, in that country at least, decide whether it is valid or invalid — the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.

France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the *comitas* or *jus gentium*, that reproach should attach to the nation whose laws are least calculated to insure the common benefit and advantage of all. For these reasons we feel bound to dismiss this petition.

It may be unfortunate for the petitioner that she should be held to be a wife in England and not so in France. If she had remained in her own country she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the court much anxiety; but from some portion of it we are relieved by the consideration that if our judgment is wrong it may be corrected by the highest tribunal in this country. *Petition dismissed.*¹

BROOK v. BROOK.

HOUSE OF LORDS. 1861.

[Reported 9 House of Lords Cases, 193.]

WILLIAM LEIGH BROOK, of Meltham Hall, in the county of York, married in May, 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. In October, 1847, Mrs. Brook died. On the 7th June, 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona, in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr. Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union. Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September, 1855,

¹ Acc. C. v. Graham, 157 Mass. 73. — Ed.

Mrs. Emily, the second wife of Mr. Brook, died at Frankfort of cholera, and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

Mr. Brook, in the early part of the day on which he died, executed a will by which he disposed of his property among his five children, and appointed his brother Charles Brook, and his two brothers-in-law, John and Edward Armitage, his executors and trustees. In consequence of the state of his property and of some pending purchases of land, and afterwards on account of the death of the infant Charles Armitage Brook, it became necessary to institute an administration suit, and a bill was filed for this purpose in March, 1856, which by order of the court was amended, and in July, 1856, a supplemental bill was filed, making the Attorney-General a party to the suit.

The causes came on to be heard in March, 1857, before Vice-Chancellor Stuart, when certain inquiries were ordered, and in June, 1857, the chief clerk certified (among others) the facts above stated, and the certificate raised the question of the validity of the marriage at Wandsbeck. Evidence was taken on this subject, and several declarations were made by officials and by advocates in Holstein, that the marriage of a widower with the sister of his deceased wife was perfectly lawful and valid in Denmark to all intents and purposes whatever.

The cause coming on for hearing, on further directions, Vice-Chancellor Stuart called in the assistance of Mr. Justice Creswell, who, on the 4th December, 1857, declared his opinion that the marriage at Wandsbeck was by the law of England invalid. Vice-Chancellor Stuart on the 17th April, 1858, pronounced judgment, fully adopting this opinion, and decreed accordingly. This appeal was then brought.¹

LORD CAMPBELL, LORD CHANCELLOR. My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th June, 1850, in the duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England, marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark?

I am of opinion that this depends upon the question whether such a marriage would have been held illegal, and might have been set aside in a suit commenced in England in the lifetime of the parties before the passing of statute 5 & 6 Wm. IV. c. 54, commonly called Lord Lyndhurst's Act.

I quite agree with what was said by my noble and learned friend during the argument on the Sussex peerage, that this act was not

¹ Arguments of counsel are omitted. — Ed.

brought in to prohibit a man from marrying his former wife's sister, and that it does not render any marriage illegal in England which was not illegal before. The object of the second section was to remedy a defect in our procedure, according to which marriages illegal, as being within the prohibited degrees either of affinity or consanguinity, however contrary to law, human and divine, and however shocking to the universal feelings of Christians, could not be questioned after the death of either party. But no marriage that was before lawful was prohibited by the act; and I am of opinion that no marriage can now be considered void under it, which, before the act, might not, in the lifetime of the parties, have been avoided and set aside as illegal.

There can be no doubt that before Lord Lyndhurst's Act passed, a marriage between a widower and the sister of a deceased wife, if celebrated in England, was unlawful, and in the lifetime of the parties could have been annulled. Such a marriage was expressly prohibited by the Legislature of this country, and was prohibited expressly on the ground that it was "contrary to God's law." Sitting here, judicially, we are not at liberty to consider whether such a marriage is or is not "contrary to God's law," nor whether it is expedient or inexpedient.

Before the Reformation the degrees of relationship by consanguinity and affinity, within which marriage was forbidden, were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill v. Good*, Vaugh. 302, and *Reg. v. Chadwick*, 11 Q. B. 173, 205, are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

Indeed, this is not denied on the part of the appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law

of the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that "a marriage valid where celebrated is good everywhere," is to be found in the writings of many eminent jurists who have discussed the subject.

I will give one quotation from Huberus de Conflictu Legum, bk. 1, tit. 3, § 2: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" Then he gives "marriage" as the illustration: "*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, præjudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*" Id. § 8. The same great jurist observes: "*Non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt.*" Id. § 10.

Mr. Justice Story, in his valuable treatise on the Conflict of Laws, while he admits it to be the "rule that a marriage valid where celebrated is good everywhere," says, § 113 *a*, there are exceptions; those of marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds, § 114, "in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous." The conclusion of this sentence was strongly relied upon by Sir Fitz-Roy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant States on the Continent of Europe and in most of the States in America.

Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion

of the majority of my fellow-citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the variation of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law.

Indeed, as Story allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of England in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion that all such marriages were incestuous and contrary to God's word I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike.

An attempt has been made to prove that a marriage between a man and the sister of his deceased wife is declared by Lord Lyndhurst's Act to be no longer incestuous. But the enactment relied upon applies equally to all marriages within the prohibited degrees of affinity, and on the same reasoning would give validity to a marriage between a step-father and his step-daughter, or a step-son and his step-mother, which would be little less revolting than a marriage between parties nearly related by blood.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus, in the great case of *Hill v. Good*, Vaugh. 302, Lord Chief Justice Vaughan and his brother judges of the Court of Common Pleas, held, that "When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all courts and proceedings of the kingdom to be so."

In *Harford v. Morris*, 2 Hagg. Cons. 428, 434, the great judge who presided clearly indicates his opinion that marriages celebrated abroad are only to be held valid in England, if they are according to the law of the country where they are celebrated, and if they are not contrary to the law of England. He adds: "I do not say that foreign laws cannot be received in this court in cases where the courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the court to determine by those foreign laws."

I will only give another example, the case of *Warrender v. Warrender*, 2 Clark & F. 488, in which I had the honor to be counsel at your Lordships' bar. Sir George Warrender, born and domiciled in Scotland, married an Englishwoman in England according to the rites and ceremonies of the Church of England; but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which his wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit against her in the Court of Session for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe. It was objected that this being a marriage celebrated in England, a country in which by the then existing law, marriage was indissoluble, the Scotch court had no jurisdiction to dissolve the marriage, and *Lolly's case* was relied upon, in which a domiciled Englishman having been married in England, and while still domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, he was convicted of bigamy in England, and held by all the judges to have been rightly convicted, because the sentence of the Scotch court dissolving his first marriage was a nullity. But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, although the law of England where the marriage was celebrated regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland, in which the husband was domiciled, and that although by the law of England marriage was indissoluble, yet as by the law of Scotland the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly constituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of

God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

Sir FitzRoy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort brought forward by Sir FitzRoy Kelly, that our courts have no jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration, because, as he says, the Ecclesiastical Courts, which had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the Ecclesiastical Court from examining and deciding this question. Suppose in a probate suit the validity of a marriage had been denied, its validity must have been determined by the Ecclesiastical Court, according to the established principles of jurisprudence, whether it was celebrated at home or abroad.

Sir FitzRoy Kelly further argued with great force, that both Sir Cresswell Cresswell and Vice-Chancellor Stuart have laid down that Lord Lyndhurst's Act binds all English subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to say that in my opinion this is incorrect, and that Lord Lyndhurst's Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord Lyndhurst's Act to introduce any new prohibition of marriage in any part of the world. For this reason, I do not rely on the *Sussex Peerage Case* as an authority in point, although much reliance has been placed upon it; my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world; but on the ground of the marriage being prohibited in England as "contrary to God's Law."

I will now examine the authorities relied upon by the counsel for the appellants. They bring forward nothing from the writings of jurists except the general rule, that contracts are to be construed according to the *lex loci contractus*, and the saying of Story with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented.

But there are various decisions which they bring forward as conclusive in their favor. They begin with *Compton v. Bearcroft*, and the class of cases in which it was held that Gretna Green marriages were valid in England, notwithstanding Lord Hardwicke's Marriage Act, 26 Geo. II. c. 33. In observing upon them, I do not lay any stress on the proviso in this act that it should not extend to marriages in Scotland or beyond the seas; this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to England, and that marriages in Scotland and beyond the seas should continue to be viewed according to the law of Scotland and countries beyond the seas, as if the act had not passed. But I do lay very great stress on the consideration that Lord Hardwicke's Act only regulated banns and licenses, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licenses can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or license in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the Legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of Mr. Justice Coleridge in *Reg. v. Chadwick*, 11 Q. B. 238, "We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day [Henry VIII.] legislated on a misinterpretation of God's law we are bound to act upon the statute which they have passed."

The appellant's counsel next produced a new authority, the very learned and lucid judgment of Dr. Radcliff, in *Steele v. Braddell*, Milw. Eccl. 1. The Irish statute, 9 Geo. II. c. 11, enacts, "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court in order to annul the marriage." A young gentleman, a native of Ireland, and domiciled there, went while a minor into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in Ireland, in which Dr. Radcliff presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage, in whatever country, without the consent of father or guardian. But the learned judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it,

on the principle that parties endeavored to evade it." And after an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parties and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as "contrary to the word of God," undoubtedly the marriage would have been dissolved. Dr. Radcliff expressly says, "It cannot be disputed that every State has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed."

Another new case was brought forward, decided very recently by Sir Cresswell Cresswell, *Simonin v. Mallac*, 29 Law J. N. S. Prob. 97. This was a petition by Valerie Simonin for a declaration of nullity of marriage. The petitioner alleged that a pretended ceremony of marriage was had between the petitioner and Léon Mallac of Paris, in the parish church of St. Martin's-in-the-Fields; that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the Code Napoléon; that the parties were natives of and domiciled in France, and that subsequently to their return to France the Civil Tribunal of the Department of the Seine had, at the suit of Léon Mallac, declared the said pretended marriage to be null and void. Léon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to London to avoid the French law, which required the consent of parents or guardians to their union, were married by license in the parish church of St. Martin's-in-the-Fields. Sir Cresswell Cresswell, after the case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned judge delivered as assessor to Vice-Chancellor Stuart in *Brook v. Brook*? Nothing whatever; for the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case, therefore, comes into the same category as *Compton v. Bearcroft* and *Steele v. Braddell*, decided by Dr. Radcliff.

None of these cases can show the validity of a marriage which the law of the domicil of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some American decisions, cited on behalf of the appellants, remain to be noticed. In *Greenwood v. Curtis*, 6 Mass. 358, the general doctrine was acted upon that a contract, valid in a foreign State, may be enforced in a State in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the State in which it is to be enforced." Now the Legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example.

Medway v. Needham, 16 Mass. 157, according to the marginal note, decides nothing which the counsel for the respondents need controvert. "A marriage which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live; but this principle will not extend to legalize incestuous marriages so contracted." This judgment was given in the year 1819. As in England, so in America, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of Medway, or the inhabitants of the district of Needham, were bound to maintain a pauper, depended upon the validity of a marriage between a mulatto and a white woman. They were residing in the province of Massachusetts at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island, and were there married according to the laws of that province. They then returned to Massachusetts. Chief Justice Parker held that the marriage was there to be considered valid, and, so far, the case is an authority for the appellants. But I cannot think that it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicil were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which this marriage is not prohibited, to celebrate

a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful. Indeed Chief Justice Parker expressly allowed that his doctrine would not extend to cases in which the prohibition was grounded on religious considerations, saying, "If without any restriction, then it might be that incestuous marriages might be contracted, between citizens of a State where they were held unlawful and void, in countries where they were prohibited."

The only remaining case is *Sutton v. Warren*, 10 Met. 451. The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in England on the 24th of November, 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the State of Massachusetts. The parties stood to each other in the relation of aunt and nephew, Ann Hills being own sister of the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the State of Massachusetts. By the law of that State a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the Supreme Court of Massachusetts held that this was to be considered a valid marriage in Massachusetts. But I am bound to say that the decision proceeded on a total misapprehension of the law of England. Justice Hubbard, who delivered the judgment of the court, considered that such a marriage was not contrary to the law of England. Now there can be no doubt that although contracted before the passing of 5 & 6 Wm. IV. c. 54, it was contrary to the law of England, and might have been set aside as incestuous, and that act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity; so that if Samuel Sutton and Ann Hills were now to return to England, their marriage might still be declared null and void, and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the State in which it was celebrated, and in which the parties were domiciled, is to be held valid in another State into which they emigrate, although by the law of this State, as well as of the State of celebration and domicil, such a marriage is prohibited and declared to be null and void. This decisions, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, my Lords, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the appellants, and I must say that they seem to me quite insufficient to show that the decree appealed against is erroneous.

The law upon this subject may be changed by the legislature, but I am bound to declare that in my opinion, by the existing law of England this marriage is invalid. It is therefore my duty to advise your Lordships to affirm the decree, and dismiss the appeal.

LORD CRANWORTH.¹ There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries no such difficulties as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries, is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong.

The real question, therefore, is, whether the law of this country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark?

I think it does. . . .

Assuming, then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in England? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this.

It was contended that, according to the argument of the respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in

¹ Part of each of the following opinions is omitted. — Ed.

incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our law which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction.

LORD ST. LEONARDS. I consider this as purely an English question. It depends wholly upon our own laws, binding upon all the Queen's subjects. . . . I am clearly of opinion that this marriage was rendered void by the Act of Will. IV.

LORD WENSLEYDALE. Both the judges in the court below form their judgment, first, on the ground of the illegality of such a marriage in England, prohibited from very early times by the legislature, and finally by Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54; secondly, on the ground that that act itself is to be considered as a personal act, in effect prohibiting all British born subjects, in whatever part of the world they might happen to be, from contracting such marriages, and declaring those marriages to be absolutely void. . . .

It is unnecessary to enter into the discussion of this part of the case, if the other ground is satisfactory, which I think it is. But as at present advised, I dissent upon this point from my noble and learned friend who has just addressed your Lordships. I think the construction put upon this as a personal act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable, that is, which were really void according to our law, though they could be avoided only by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties.

It is the established principle that every marriage is to be universally recognized, which is valid according to the law of the place where it was had, whatever that law may be. . . . But this universally approved rule is subject to a qualification. Huber, in his first book, tit. 3, art. 8, says: "*Matrimonium si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*" A similar qualification is introduced by Story, *Conf. of L.* §§ 113 *a*, 114. He states, that the most prominent, if not the only, known exceptions to the rule, are, first, those marriages involving polygamy and incest; second, those positively prohibited by the public law of

a country from motives of policy, and a third having no bearing upon the question before us.

The statute law of the country, which is binding on all its subjects, . . . must be considered as pronouncing that this marriage is a violation of the Divine law, and therefore that it is void within the first exception made by Mr. Justice Story, and within the principle of the exception laid down by Huber. If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice as prejudicial to our social interest and of hateful example. But if not, it most clearly falls within the second exception stated by Story, which alone, I think, need be considered, as it is clearly illegal by the law of this country whether it be considered incestuous or not, and a violation of that law.

I do not, therefore, in the least doubt that before the 5 & 6 Wm. IV. it would have been pronounced void by the Ecclesiastical Court on a suit instituted during the life of both parties. And therefore I advise your Lordships that the judgment should be affirmed.

*Order appealed against affirmed, and appeal dismissed with costs.*¹

SOTTOMAYOR v. DE BARROS.

COURT OF APPEAL. 1877.

[Reported 3 Probate Division, 1.]

COTTON, L. J. This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the court to declare her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge, the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was

¹ *Contra*, Danelli v. Danelli, 4 Bush, 51; Sutton v. Warren, 10 Met. 451. — Ed.

admitted before us that such a marriage would be valid if solemnized under the authority of a papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin v. Mallac*, 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97, than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between

persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized. In argument several passages in Story's *Conflict of Laws* were referred to, in support of the contention that in an English court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicil, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook v. Brook*, 9 H. L. C. 193, at pp. 227, 241, by Lord Cranworth and by Lord Wensleydale, who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicil.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognize the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnized between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favor of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicil of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being

relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country.

The counsel for the petitioner relied on the case of *Brook v. Brook*, as a decision in his favor. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnized during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin v. Mallac*. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin v. Mallac* does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

*Judgment reversed.*¹

¹ The case having been sent down to the Probate Division of the High Court, Sir JAMES HENNEN, President, found that though the petitioner was domiciled in Portugal at the time of the marriage, the respondent was domiciled in England at that time; and he held the marriage valid. In the course of his opinion he said: "The Lord Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: 'It is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile;' and again, 'As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile' It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way." — ED.

WARTER v. WARTER.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1890.

[*Reported 15 Probate Division, 152.*]

SIR JAMES HANNEN, PRESIDENT. The plaintiff claims probate of a will¹ dated February 6, 1880, made by her father, Henry De Grey Warter, who died on March 23, 1889. The defendant, the son of Henry De Grey Warter, alleges that the will, dated February 6, 1880, was revoked by the subsequent marriage of the testator with Annette Louisa Tayloe on April 2, 1881. The question in the cause is whether the marriage celebrated on April 2, 1881, was the marriage of the parties—that is, whether they had not concluded a valid marriage before the execution of the will—namely, on February 3, 1880. The material facts are as follows: The mother of the plaintiff and defendant was formerly the wife of John Edward Tayloe, and was resident with him in India. In 1879 Henry De Grey Warter, the deceased in this cause, was a major in the Royal Artillery, stationed in India. In 1879 John Edward Tayloe, being so resident, instituted proceedings in the High Court of Judicature at Fort William in Bengal for the dissolution of his marriage on the ground of his wife's adultery with Major De Grey Warter, and a decree nisi was pronounced on May 19, 1879. This decree was made absolute on November 27, 1879. By the Indian Divorce Act of 1869, jurisdiction is given to dissolve the marriage when the petitioner professes the Christian religion and resides in India at the time of presenting the petition—that is, though he or she may not be domiciled there. On the institution of the proceedings Mrs. Tayloe returned to England. Major De Grey Warter afterwards joined her in England, and went through a ceremony of marriage on February 3, 1880. At the time of the marriage Major De Grey Warter was domiciled in England. By the Indian Divorce Act—Act No. 4 of 1869—under which the proceedings were taken, it is enacted that “when six months after the date of any decree of the High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.” The marriage in question in this case took place within three months of the decree. It was contended that as this marriage was celebrated in England the parties were freed from the restraint imposed by the Indian Divorce Act. I am of opinion that that is not the case. Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her

¹ By the terms of his will Colonel Warter left all his property to his “reputed wife.”—ED.

previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage. The case of *Scott v. Attorney-General*, 11 P. D. 128, was relied on for the plaintiff. I there held that a colonial law prohibiting the marriage of the guilty party, so long as the other remained unmarried, did not operate as a bar to marriage where the guilty party had acquired a domicile in this country. The distinction between that case and the present is that there the incapacity to remarry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted. A case to the same effect, and based on the same principle, was cited from an American report: *Ponsford v. Johnson*, 2 Blatchf. 51. For these reasons I am of opinion that the marriage of February 3, 1880, was invalid, and consequently that the will of February 6, 1880, was revoked by the valid marriage celebrated on April 2, 1881.¹

WALL v. WILLIAMSON.

SUPREME COURT OF ALABAMA. 1845.

[*Reported, 8 Alabama, 48.*]

ASSUMPSIT, by Williamson, against the defendant, as the maker of a promissory note. At the trial, upon the general issue, the defendant produced evidence tending to prove, that she and one David Wall lived together, as man and wife, from the year 1881 until the year 1889, in the territory belonging to the Choctaw Indians, until that was annexed to, and made the county of Sumter; after which they lived in the same relation, in that county, near the same place where they previously had resided, and until the said David left the State of Alabama, in 1839, and went to the Choctaw country, west of the Mississippi. Both were of Indian extraction, and of the Choctaw tribe; that they were regarded as man and wife by the tribe, and as having been properly married, according to the laws and customs of the Choctaws. The defendant had said, that she had been advised that she had not been legally married; that she had been married in the Choctaw territory, by one Pistole, a justice of the peace from Marengo County. It was also in proof, that by the laws and customs of the Choctaws, the husband, by his marriage, takes no part of his wife's property; that among them, a man takes a wife at pleasure, and dissolves the marriage whenever he pleases, and that the men are allowed a plurality of wives.

¹ Acc. *McLennan v. McLennan*, 13 Or. 480, 50 Pac. 802. — Ed.

Upon this state of proof, the defendant requested the court to instruct the jury, that a marriage under the laws and customs of the Choctaws, entered into in a place where such laws and customs are in force, is recognized as a valid marriage by the laws of Alabama, when the same are extended over the territory where the parties so married reside.

This was refused, and the court charged the jury — 1. That the living together of an Indian man and woman would not be regarded by the laws of this State, as such a marriage as would affect a contract entered into by the female. 2. That if the defendant was abandoned by Wall, and she executed the note after he had left her, that she would be bound by her contract, although she might have been married. 3. That if, according to the customs among the Choctaws, the parties to a marriage can dissolve it at pleasure, by mere separation, and that the defendant and Wall did so separate, then the defendant was liable on her contract, as a *feme sole*.

The defendant excepted to the refusal of the court to give the charge requested, as well as to those given, and error is assigned upon the bill of exceptions.

GOLDTHWAITE, J. Previous to entering upon the consideration of the questions raised, by the refusal to give the charge requested by the defendant, it is not improper to ascertain what facts had to be ascertained by the jury, from the evidence. The existence of a marriage between David Wall and the defendant, at the time when the note sued on was given by Mrs. Wall, was one of the principal matters to be passed upon. Once established, to the satisfaction of the jury, as having been entered into, in conformity with the usages of the Choctaw tribe of Indians, its effect, in connection with the laws of this State, became a very material subject of inquiry. The defendant insisted then, and now, that if this marriage was valid, by the laws and usages of the Choctaw tribe of Indians, it is recognized as valid by the laws of Alabama. The validity of the marriage, and not the consequences of it, as to the defendant, was, at that time, the subject for instruction. If the marriage is not to be recognized as valid by our law, it was of no consequence to the defendant what further charge was given for or against her, because her entire defence rested on sustaining that proposition. All the testimony in relation to rights of husband and wife under the Choctaw law may have been of a disputable or doubtful nature. These observations are called for because it has been assumed that this charge was immaterial, and that all the case is covered by the charge actually given by the court.

1. With respect to the refusal of this charge, it is not unlikely that the Circuit Court intended to be understood by the counsel that the charge was refused, not as an incorrect proposition, but for the reason that the case was clear for the plaintiff, even if it was conceded. If such was the impression of the court, the charge should have been given, with the necessary explanation to direct the jury to the consideration of those points deemed to be more material. The general rule

upon this subject is, that a marriage valid at the place where contracted is deemed to be valid everywhere else. Story, *Conf. of Laws*, §§ 77, 79, 103, 113 *a*. It is said by the same author that the most prominent, if not the only exceptions to this rule, are those marriages involving polygamy and incest. *Ib.* § 113 *a*, 114.

These, the learned author says, Christianity is understood to prohibit, and therefore no Christian country would recognize polygamous or incestuous marriages. Lord Brougham, in *Warrender v. Warrender*, (cited in a note to § 114, 9 Bligh. 112,) says, "It is important to observe that we regard it (marriage) as a wholly different thing, a different status, from Turkish or other marriages among infidel nations; because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate." If this doctrine is to be understood as leading to the conclusion that a court can collaterally inquire into the existence of such a relationship as would, in a direct proceeding, annul the marriage, it is very questionable whether it is sustainable. 1 Black. Com. 434. A parallel case to a Turkish or other marriage in an infidel country will probably be found among all our savage tribes, but can it be possible that the children must be illegitimate if born of the second or other succeeding wife? However the true rule may be, it is immaterial to this case, unless it can be shown that when the law tolerates polygamy there can be neither lawful wife nor legitimate children, for here the evidence does not disclose any previous marriage.

The validity of the marriage may possibly have been denied upon the impression that having been contracted within the territorial limits of the State, it cannot be affected by Choctaw usages or customs, though both parties were of that tribe and resident within its bounds.

2. The refusal cannot be sustained on this ground. Waiving the consideration of the peculiar relation which these Indian tribes bear to the States, within the limits of which they were resident, and assuming that the individuals composing the tribes could by the States have been made subject to their general laws, the question yet remains whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded; or whether they composed a distinct community, governed by their own chiefs and laws. It is not pretended that any statute producing this effect was then passed, and therefore, if lost at all, their local laws must have been lost in consequence of their living within the territorial limits of the States. It may be difficult to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then there cannot be said to be a merger. It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war, produces no such effect. It may therefore be considered that the usages and customs of the Choctaw tribe continued as their law, and

governed their people, at the time when this marriage was had. The consequence is, that if valid by those customs it is so recognized by our law.¹

For that error, in refusing thus to charge, the judgment must be reversed and the cause remanded.

3. But although this result is arrived at, it yet remains necessary to ascertain what further instructions ought to have been, or should be, given. The evidence tended to show that by the Choctaw law the husband takes no part of the wife's property. A necessary consequence of this peculiarity is, that the wife must have the capacity to contract, for otherwise she would be incapable, in many instances, to preserve or protect her property. The bill of exceptions is silent as to any positive law among them, as to this point, but the inference is direct and immediate, from what was proved. Having, by their law, the capacity to contract, it is also likely that means were provided by it for its enforcement; but if that was the case, we do not see how she could be sued in a court of law, so long as the marriage continued. It would present nothing but the case of a wife with a separate estate to her own use. It may be possible that the objection to the form of action could not be urged at the trial, but it is unnecessary to consider this point further, because we are clear that the marriage was dissolved according to Choctaw usages by the abandonment of the husband.

4. Whatever may have been the capacity of the husband to abandon his wife, and thereby to dissolve the marriage, if both had become residents of Alabama after the tribe had departed from its limits, it is very clear that the same effect must be given to a dissolution of the marriage by the Choctaw law as given to the marriage by the same law. By that law it appears the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. However strange it may appear, at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes. Story, *Conf. of Laws*, 169.

The jury then should have been instructed that notwithstanding the marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid, yet the wife had the capacity to contract, and in case of a valid contract, was liable to be sued as a *feme sole*, if the marriage could, by the Choctaw law, be dissolved by the husband at his pleasure, and was so dissolved, which might be inferred if the husband abandoned his wife and went with his tribe beyond the Mississippi or elsewhere.

Judgment reversed and remanded.

¹ *Acc. Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N. W. 602; *Earl v. Godley*, 42 Minn. 361; *Johnson v. Johnson*, 30 Mo. 72; *Morgan v. McGhee*, 5 Humph. 13; *Connolly v. Woolrich*, 11 L. Can. Jur. 197; *Ngqobela v. Sihlele*, 10 Juta (Cape Colony), 346. *Contra, In re Bethell*, 38 Ch. D. 220. — Ed.

ROCHE v. WASHINGTON.

SUPREME COURT OF INDIANA. 1862.

[*Reported 19 Indiana, 53.*]

PERKINS, J. Suit for partition, instituted by Francis Washington against John Roche. Partition adjudged. Motion for a new trial overruled. Commissioners report partition. Report confirmed. New trial denied. Appeal to this court.

The cause was decided upon the following agreed case :

"It is hereby agreed, by the parties to this action, that the following are the facts of the case : The land in question, of which partition is prayed, was the property of La-ka-ko-quah, alias Jane Richardville, who died seized of the same in 1857, leaving no children, nor father or mother, but leaving her husband, as hereinafter stated, whose name is George Washington, and her sister, Catharine Richardville, her brother, Snap Richardville, and Francis Washington, the plaintiff, who is an only son of her sister, Ah-tah-pe-tah-neah, deceased. It is further agreed, that the defendant, John Roche, has the title of George Washington, Catharine and Snap Richardville, conveyed to him since the decease of the said Jane Richardville. It is further agreed, that all of the foregoing persons, except the defendant, are, or were, Miami Indians.

"It is further agreed, that, in the year 1844, the said George Washington, according to the manner and custom of marriage in said Miami tribe of Indians, was duly married to Le-qua, a Miami Indian, with whom he lived, residing in Huntington County, Indiana, where a part of the said Miami tribe then and since have resided ; that in the year 1846 the said George Washington and the said Le-qua, according to the manner and custom of divorce in said Miami tribe, were duly divorced ; that in the same year, 1846, said Le-qua removed to Kansas territory, where she has since resided, and now resides ; that afterward, in the year 1847, said George Washington, according to the custom of said tribe of Indians, was married to the said Ah-tah-pe-tah-neah, who departed this life in 1852, leaving said Francis Washington her only surviving child ; that afterward, in 1853, said George Washington, according to the custom of said Indian tribe, was married to said La-ka-ko-quah, alias Jane Richardville, and that the two lived together, and cohabited as man and wife, till her death, at the county of Huntington, in 1857, she dying childless.

"It is further agreed, that the Indian custom of marriage requires no ceremony further than the agreement of the parties to live together as husband and wife, the agreement being consummated by living and cohabiting together as such.

"It is further agreed, that the Indian custom of divorce requires no special form of proceeding, other than that the parties disagree, and,

by consent, separate, the mother usually taking care of, and receiving the annual payment of the Government to, the children; and that the said customs of marriage and divorce are the ancient, immemorially continued, and present existing customs among all of said tribe of Indians, and the law thereof; and that the same have continued to exist, as their customs and laws, from a period beyond the memory of man."

The question intended to be presented for our decision in this cause is, whether the courts of Indiana will hold valid, as marriages, such unions, and as divorces, such separations, as those described in the agreed statement of facts, they having been made under, and being sanctioned by, the laws of the Miami tribe of Indians.

It is claimed that, by the law of nations, the courts of Indiana must uphold Indian marriages. The law of nations, or international law, is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized States. 1 Kent, p. 1. It is very properly divided by late writers into public and private. Public, that which regulates the political intercourse of nations with each other. Private, that which regulates the comity of States in giving effect, in one, to the municipal laws of another, relating to private persons, their contracts, etc.

The first question to be decided is, then, Does a tribe of North American Indians constitute a State? We think not. A State has been defined to be "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs [or by a constitution], into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities." See New Am. Cyclop. vol. x., p. 360; Wheat. L. of Nations, pp. 53, 54; 1 Kent, 188, 189. But few of the particulars enumerated as constituting a State, exist in a tribe of North American Indians. See, however, *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This the court judicially takes notice of as matter of general historical knowledge; the Indians are not educated above the condition of nomadic, pastoral tribes, if up to it. Neither, were these tribes conceded to be States or nations, in the political or international sense of the terms, are they civilized.

Civilization, it is true, is a term which covers several states of society; it is relative, and has not a fixed sense; but, in all its applications, it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know, historically, that the North American Indians

are classed as savage and not as civilized people; and that, in fact, it is problematical whether they are susceptible of civilization.

But, let it be admitted that the Miami tribe of Indians constitutes an international political State, and that it is a civilized one, still the State of Indiana is not bound by international comity to give effect, in her courts, to all the laws and customs of such State, but only to such as are not repugnant to her own laws and policy. 1 Ind. 24.

Laws giving effect to contracts of marriage are not repugnant to the laws of Indiana, and the proposition is established, as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will, not as upon a claim of right, but by courtesy, be given effect to in other States, though not celebrated by the forms nor evidenced in the mode prescribed for marriages in such other States. If, then, in the case at bar, an actual marriage took place between Jane Richardville and George Washington, there could be no objection to its being upheld in the courts of this State, though celebrated among an uncivilized tribe of Indians.

What, then, constitutes the thing called a marriage? what is it in the eye of the *jus gentium*? It is the union of one man and one woman, "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the State. Nothing short of this is a marriage. And nothing short of this is meant, when it is said, that marriages, valid where made, will be upheld in other States. Noel v. Ewing, 9 Ind. 37; Story's Conflict of Laws, chap. v.; Wheaton's Law of Nations, 137. See Reynolds v. Reynolds, 3 Allen (Mass.) Rep. 605. From what has been said, it is manifest that the union between Jane and George, described in the statement of facts in the case at bar, was not a marriage, according to the law of any civilized nation, but simply and exactly a contract and state of concubinage. See Cobb on Slavery, 245, note 4; The State v. Samuel, 2 Dev. and Bat. (N. C.) Rep. 177. But, suppose the union had been such as to constitute marriage, according to the *jus gentium*, and which the courts of this State would have upheld as such, it might not still have followed, as a consequence, that the husband would have inherited, from the wife, her real estate. The marriage is one thing, and the incidents, the legal rights, and consequences attaching upon marriage, are another; and these may be different as to real and personal property. 2 Kent, p. 93 *et seq.* Marriage, in different countries, is followed by different property rights. In the Miami nation, or tribe of Indians, marriage, supposing we concede their unions of sexes to be such, is not followed by a right in either party, by the law of the tribe, to inherit real estate from the other; for the Indians, by their laws, neither in their tribal capacity, nor individually, owned any real estate. It is a kind of property unknown to them. They simply hold vaguely defined territory, for use in hunting, fishing, etc., and they never assumed to, and could not convey, the fee, to any one. That belonged,

first, to Great Britain, as the discovering nation, and to the United States afterward, by succession to Great Britain; and it is under our laws only that any individual among these Indians ever obtained, conveyed, or inherited real estate. See *Fellows v. Denniston*, 23 N. Y. Rep. 420; *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This is the doctrine of international law held by civilized States, and acted upon without consulting the Indians. It is based or justified on the ground that the Indians never cultivated the soil. But the case does not turn on any of the foregoing points, and they need not, therefore, be regarded as decided. See, on the general subject, *Dale v. Irish*, 2 Barb. 639; *Wall v. Williamson*, 8 Ala. 48; 11 Ala. 826, and 10 Ala. 630. Also, *Jones v. Laney*, 2 Texas, 342, and the cases in the Supreme Court of the United States, cited in *Cush. Dig.* 240.

A treaty, however, may be made between a government and an association of persons not constituting an independent government. The Constitution of the United States authorizes our government to treat with foreign nations, and to regulate affairs with States and Indian tribes. We know, as a part of the law of the land, and the history of our State, that the last treaty between the Miami tribe of Indians, located in Indiana, and the United States, was in 1840; that the tribe then agreed to remove from Indiana to west of the Mississippi river; that, in 1846, the agreement was executed, the chiefs at that time extinguishing their council fires upon the Wabash, and, accompanied by most of the living members of their tribe, departing for their newly assigned and distant home. The sovereignty of the tribe, so far as it possessed sovereignty, its jurisdictional power, so far as it possessed such over persons and property in Indiana, disappeared with the light of its council fires, and departed to the new seat of the tribe.

Now, it is true as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach to acts done in such other nation. Hence, if citizens of Great Britain, of China, or of Africa, contract marriage in Indiana, that contract, to be valid, must conform to the laws of Indiana. 1 *Bright's Husband and Wife*, p. 8; 1 *Greenleaf's Ev.*, § 545. For exceptions to the general proposition above stated, see *Wheaton's Law of Nations*, p. 132, third edition. The marriage, in the case at bar, was contracted in Indiana, between Miami Indians who did not accompany the tribe to the West, but remained to live among our people; and it was contracted after all territorial jurisdiction of the tribe had ceased in the State, and after the tribe itself, with its government, had disappeared from our borders. The marriage, therefore, was clearly to be tested by the law of Indiana; certainly so when it came in question in our own tribunals.

The judgment below is affirmed, with costs.

COMMONWEALTH v. LANE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 113 *Massachusetts*, 458.]INDICTMENT on the Gen. Sts. c. 165, § 4, for polygamy.¹

GRAY, C. J. The report finds that the defendant was lawfully married to his first wife in this Commonwealth; that she obtained a divorce here from the bond of matrimony, for his adultery; that he was afterwards, while still a resident of this Commonwealth, married to a second wife in the State of New Hampshire, and cohabited with her in this Commonwealth, the first wife being still alive; and the question is whether he is indictable for polygamy, under the Gen. Sts. c. 165, § 4.

It is provided by our statutes of divorce that, in cases of divorce from the bond of matrimony, the innocent party may marry again as if the other party were dead; but that any marriage contracted by the guilty party during the life of the other, without having obtained leave from this court to marry again, shall be void, and such party shall be adjudged guilty of polygamy. Gen. Sts. c. 107, §§ 25, 26; St. 1864, c. 216.

The marriage act, Gen. Sts. c. 106, specifies, in §§ 1-3, what marriages shall be void by reason of consanguinity or affinity; in § 4, that all marriages contracted while either of the parties has a former wife or husband living, except as provided in c. 107, shall be void; in § 5, that no insane person or idiot shall be capable of contracting marriage; and in § 6 as follows: "When persons resident in this State, in order to evade the preceding provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this State."

All these sections, except the last, are manifestly directed and limited to marriages within the jurisdiction of this Commonwealth; and the last has no application to this case, because it does not appear to have been proved or suggested at the trial that the parties to the second marriage went out of this State to evade our laws, or even that the second wife had resided in this State or knew of the previous marriage and divorce.

By the Gen. Sts. c. 165, § 4, "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State," shall (except when the first husband or wife has for seven years been absent and not known to the other party to be living, or in case of a person legally divorced from the bonds of matrimony and not the guilty cause of such divorce) be deemed guilty of polygamy and punished accordingly.

This statute is not intended to make any marriages unlawful which

¹ Statement of facts and arguments of counsel are omitted.—Ed.

are not declared to be unlawful by other statutes, nor to punish cohabitation under a lawful marriage. Its object is to prohibit unlawful second marriages, whether the parties are actually married in this Commonwealth, or continue after being married elsewhere to cohabit here. But in either alternative, in order to sustain the indictment, the second marriage must be unlawful. It is not enough that the marriage is such as would be unlawful if contracted in this Commonwealth; it must be a marriage which, being contracted where it was, is unlawful here.

The marriage in New Hampshire is stated in the report to have been "according to the forms of law;" and it appears by the statutes of New Hampshire, therein referred to, that the only provision relating to the invalidity of marriages on account of the incompetency of parties to contract them is as follows: "All marriages prohibited by law, on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this State, shall be absolutely void without any decree of divorce or other legal process." Gen. Sts. of N. H. (1867), c. 163, § 1. That provision clearly does not extend to a case in which the former wife, having obtained a divorce from the bond of matrimony, was absolutely freed from all obligation to the husband, and in which, as observed by Mr. Justice Wilde, in a like case, "notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." *Commonwealth v. Putnam*, 1 Pick. 136, 139. The marriage in New Hampshire must therefore be taken to have been valid by the law of that State.

The question presented by the report is therefore reduced to this: If a man who has been lawfully married in this Commonwealth, and whose wife has obtained a divorce *a vinculo* here because of his adultery, so that he is prohibited by our statutes from marrying again without leave of this court, is married, without having obtained leave of the court, and being still a resident of this Commonwealth, to another woman in another State, according to its laws, and afterwards cohabits with her in this Commonwealth, is his second marriage valid here?

The determination of this question depends primarily upon the construction of our statutes, but ultimately upon fundamental principles of jurisprudence, which have been clearly declared by the judgments of our predecessors in this court, and in the light of which those statutes must be read in order to ascertain their just extent and effect.

What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the *jus gentium*, the common law of nations, the law of nature as generally recognized by all civilized peoples.

By that law, the validity of a marriage depends upon the question

whether it was valid where it was contracted; if valid there, it is valid everywhere.

The only exceptions admitted by our law to that general rule are of two classes: 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2d. Marriages which the legislature of the Commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws.

The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom; and, by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred. *Wightman v. Wightman*, 4 Johns. Ch. 343, 349-351; 2 Kent Com. 83; Story, Conf. § 114; *Sutton v. Warren*, 10 Met. 451; *Stevenson v. Gray*, 17 B. Mon. 193; *Bowers v. Bowers*, 10 Rich. Eq. 551.

A marriage abroad between persons more remotely related, not absolutely void by the law of the country where it was celebrated, is valid here, at least until avoided by a suit instituted for the purpose, even if it might have been so avoided in that country; and this is so whether the relationship between the parties is one which would not make the marriage void if contracted in this Commonwealth, as in the case of a marriage between a widower and his deceased wife's sister, or one which would invalidate a marriage contracted here, as in the case of a marriage between aunt and nephew.

In *Greenwood v. Curtis*, 6 Mass. 358, 378, 379, Chief Justice Parsons said: "If a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract." This distinction was approved by Chancellor Kent and by Judge Story. 2 Kent Com. 85, note a; Story, Conf. § 116.

In *The Queen v. Wye*, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; it was decided that the marriage of a man with his mother's sister in England before the St. of 5 & 6 Will. IV. c. 54, though voidable by process in the ecclesiastical courts, was, until so avoided, valid for all civil purposes, including legitimacy and settlement. In accordance with that decision, it was held in *Sutton v. Warren*, 10 Met. 451, that such a marriage contracted in England, and never avoided there, must, upon the subsequent removal of the parties to Massachusetts, and the

question arising collaterally in an action at common law, be deemed valid here, although, if contracted in this Commonwealth, it would have been absolutely void.

A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here. This has been repeatedly affirmed by well-considered decisions.

For example, while the statutes of Massachusetts prohibited marriages between white persons and negroes or mulattoes, a mulatto and a white woman, inhabitants of Massachusetts, went into Rhode Island, and were there married according to its laws, and immediately returned into Massachusetts; and it was ruled by Mr. Justice Wilde at the trial, and affirmed by the whole court, that the marriage, even if the parties went into Rhode Island to evade our laws, yet, being good and valid there, must upon general principles be so considered here, and that the wife therefore took the settlement of her husband in this Commonwealth. *Medway v. Needham*, 16 Mass. 157.

So it has been held that a man, from whom his wife had obtained in this State a divorce *a vinculo* for his adultery, which by our statutes disabled him from contracting another marriage, might lawfully marry again in another State according to its laws; that the children of such marriage took the settlement of their father in this Commonwealth; and that the new wife was entitled to dower in his lands here, even if the wife as well as the husband was domiciled here, and knew of the previous divorce and its cause, and went into the other State to evade our laws—so long as our statutes did not declare a marriage contracted there with such intent to be void here. *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433. See also *Dickson v. Dickson*, 1 Yerger, 110; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; 2 Kent Com. 91-93.

The principles upon which these decisions proceeded were recognized in all the English cases decided before the American Revolution, although it is true, as has since been pointed out, that the particular question in each of them related rather to the forms required than to the capacity of the parties.

Lord Hardwicke's Marriage Act in 1752 provided that all marriages of minors, solemnized by license without the consent of parents or guardians, should be void. St. 26 Geo. II. c. 33, § 11. Yet in the first case which arose under that act, in which an English boy of eighteen years old went abroad with an English woman, and was there married to her without such consent, Lord Hardwicke, sitting as chancellor, assumed that if the marriage had been valid by the law of the country in which it was celebrated, it would have been valid in England, saying: "It will not be valid here unless it is so by the laws of

the country where it was had ; and so it was said by Murray, attorney-general, to have been determined lately at the Delegates." And it would seem by the report that the woman defeated an application to the Ecclesiastical Court to annul the marriage, by refusing to appear there. *Butler v. Freeman*, Ambler 301.

The case, thus referred to as determined at the Delegates, was evidently *Scrimshire v. Scrimshire*, decided by Sir Edward Simpson in the Consistory Court in 1752. Of that opinion, Sir George Hay, in *Harford v. Morris*, 2 Hagg. Con. 423, 431, said, "Every man has allowed the great and extensive knowledge of the judge;" and Sir William Wynne, in *Middleton v. Janverin*, 2 Hagg. Con. 437, 446, remarked that he remembered to have heard that the judgment was founded on great deliberation, and that Lord Hardwicke was consulted on it.

In *Scrimshire v. Scrimshire*, Sir Edward Simpson, in delivering judgment, said : "The question being in substance this, Whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the law of the country in which they are formed ; and whether they are not to be construed by that law? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision." "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries, — that is, the law where the contract is made." And he declared the marriage in that case to be invalid, only because it appeared to be wholly null and void by the laws of France, where it was celebrated. 2 Hagg. Con. 395, 407, 408, 417, 421.

In *Compton v. Bearcroft* (1767–69), where the parties, both being English subjects and the libellant a minor, ran away and were married in Scotland, a libel for the nullity of the marriage was dismissed by Sir George Hay in the Court of Arches, upon the ground that Lord Hardwicke's Act did not extend to Scotland; but by the Court of Delegates on appeal, consisting of Justices Gould and Aston, Baron Perrott, and two doctors of civil law, upon the broader ground that the marriage was good by the *lex loci*. 2 Hagg. Con. 430, 443, 444, and note; s. c. Bul. N. P. 113, 114. See also *Ilderton v. Ilderton*, 2 H. Bl. 145; *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54, 59; *Ruding v. Smith*, ib. 371, 390, 391; *Steele v. Braddell*, Milward, 1, 21.

In a recent case in the House of Lords, the cases of *Medway v.*

Needham, 16 Mass. 157, and Sutton *v.* Warren, 10 Met. 451, above cited, have been severely criticised, and pointedly denied to be law. Brook *v.* Brook, 9 H. L. Cas. 193; s. c. 8 Sm. & Giff. 481. As that court is the one of all foreign tribunals, the opinions of which, owing to the learning, experience, and ability of the judges, we are accustomed to regard with the most respect, it becomes necessary to examine with care the scope of that decision, and the soundness of the reasons assigned for it; and in order to make this examination intelligible, it will be convenient first to refer to the English statutes and to some earlier decisions.

Several statutes of Henry VIII., which it is necessary to state in detail, declared marriages within certain degrees of consanguinity and affinity, and among others the marriage of a widower with his deceased wife's sister, to be "contrary to God's law as limited and declared by act of Parliament." Sts. 25 Hen. VIII. c. 22; 28 Hen. VIII. cc. 7, 16; 32 Hen. VIII. c. 38. While those statutes remained unaltered, a period of nearly three hundred years, such marriages were held by the judges not to be absolutely void, but voidable only by suit in the ecclesiastical courts during the lifetime of both parties, and, if not so avoided, were treated as valid, the wife entitled to dower, and the children of the marriage legitimate. Co. Lit. 38; Hinks *v.* Harris, 4 Mod. 182; s. c. 12 Mod. 35; Carth. 271; 2 Salk. 548. Lord Hardwicke, in *Brownsword v. Edwards*, 2 Ves. Sen. 243, 245; 1 Bl. Com. 434, 435; Elliott *v.* Gurr, 2 Phillim. 16; *The Queen v. Wye*, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; *Westby v. Westby*, 2 Dru. & War. 502, 515, 516; s. c. 1 Con. & Laws. 537, 544, 545; 4 Irish Eq. 585, 593.

The St. of 5 & 6 Will. IV. c. 54, commonly known as Lord Lyndhurst's Act, provided, as to marriages between persons within the prohibited degrees of affinity, as follows: 1st, that such marriages, celebrated before the passage of the act, should not be annulled, except in a suit already pending in the ecclesiastical courts; 2d, that such marriages, thereafter celebrated, should be absolutely null and void to all intents and purposes whatever; 3d, that nothing in this act should be construed to extend to Scotland.

The marriage of a widower with the sister of his deceased wife, in England, after this statute, was held to be within the prohibited degrees and utterly void. *The Queen v. Chadwick*, 11 Q. B. 173, 234.

A case afterwards came before the Scotch courts, in which an English citizen married his deceased wife's sister in England; the validity of the marriage was not disputed during her life, and she died before the St. of Will. IV.; and the question was, whether the children of the marriage could inherit his lands in Scotland. The Scotch courts, in a series of very able opinions, held that they could, upon the ground that by the law of England, the marriage, not having been challenged in the lifetime of both parties, could not in any form be declared invalid in England, and the children were legitimate there, and must therefore

be deemed legitimate in Scotland. *Fenton v. Livingstone*, 16 Ct. of Sess. Cas. (2d Series) 104, and 18 ib. 865. The House of Lords, on appeal, reversed that decision, and held that, although the marriage had, by reason of the peculiar rules governing the English courts of temporal and ecclesiastical jurisdiction, become irrevocable there, yet it was always illegal; and that, those rules not being applicable in the Scotch courts, the legitimacy of the children in Scotland depended upon the question whether the marriage was illegal by the law of Scotland. s. c. 8 Macq. 497. The Scotch court thereupon decided that the marriage was illegal, and that the children were incapable of inheriting lands in Scotland. s. c. 23 Ct. of Sess. Cas. (2d Series) 366.

In *Brook v. Brook*, *ubi supra*, a widower and the sister of his deceased wife, being lawfully domiciled in England, while on a temporary visit to Denmark, had a marriage solemnized between them, which was by the laws of Denmark lawful and valid to all intents and purposes whatsoever. In a suit in equity, brought after the death of both parties, to ascertain the rights of the children in their father's property, the House of Lords, in accordance with the opinions of Lords Campbell, Cranworth, St. Leonards, and Wensleydale, and affirming a decree rendered by Vice Chancellor Stuart, assisted by Mr. Justice Cresswell, held that the marriage in Denmark was wholly void by the St. of Will. IV., and that the children of that marriage were bastards.

The decision was put, by the learned judges who concurred in it, upon three different grounds.

The first ground was that the St. of Will. IV. disqualified English subjects everywhere from contracting such a marriage. This ground was taken in the court below, and by Lord St. Leonards in the House of Lords. 3 Sm. & Giff. 522, 525; 9 H. L. Cas. 234-238. But it was expressly disclaimed by Lord Campbell, Lord Cranworth, and Lord Wensleydale, the two former of whom expressed opinions that the statute did not extend to all the colonies, and all three declared that they did not think its purpose was to put an end to such marriages by British subjects throughout the world. 9 H. L. Cas. 214, 222, 240.

The second ground, which was suggested by Mr. Justice Cresswell and Lord Wensleydale only, and is opposed to all the American authorities, was that the case justly fell within the first exception, stated in Story, Conf. § 114, of marriages involving polygamy and incest. 3 Sm. & Giff. 513; 9 H. L. Cas. 241, 245. In view of that position, it may be observed that in an earlier case, in which Lord Wensleydale himself (then Baron Parke) delivered the opinion, a marriage of a widower with his deceased wife's sister, before the St. of Will. IV., was prevented from being made irrevocable by that statute, only by the institution, a week before its passage, of a suit for nullity in the Ecclesiastical Court by the father of the supposed wife; and by the

decision of the Privy Council, that because, if the marriage was not set aside, the birth of a child of the marriage would impose a legal obligation upon the grandfather to maintain the child in the event of its being poor, lame, or impotent, and unable to work, he had, according to the rules of the ecclesiastical courts, a sufficient interest, "although of an extremely minute and contingent character," to support such a suit. *Sherwood v. Ray*, 1 Moore P. C. 353, 401, 402.

The third ground, upon which alone all the law lords agreed, was that the St. of Will. IV. made all future marriages of this kind between English subjects, having their domicile in England, absolutely void, because declared by act of Parliament to be contrary to the law of God, and must therefore be deemed to include such marriages, although solemnized out of the British dominions.

The law of England, as thus declared by its highest legislative and judicial authorities, is certainly presented in a remarkable aspect. 1st. Before the St. of Will. IV., marriages within the prohibited degrees of affinity, if not avoided by a direct suit for the purpose during the lifetime of both parties, had the same effect in England, in every respect, as if wholly valid. 2d. This statute itself made such marriages, already solemnized in England, irrevocably valid there, if no suit to annul them was already pending. 3d. It left such marriages in England, even before the statute, to be declared illegal in the Scotch courts, at least so far as rights in real estate in Scotland were concerned. 4th. According to the opinion of the majority of the law lords, it did not invalidate marriages of English subjects in English colonies, in which a different law of marriage prevailed. 5th. But it did make future marriages of this kind, contracted either in England or in a foreign country, by English subjects domiciled in England, absolutely void, because declared by the British Parliament to be contrary to the law of God.

The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

The case recalls the saying of Lord Holt, in *London v. Wood*, 12 Mod. 669, 687, 688, that "an act of Parliament can do no wrong, though it may do several things that look pretty odd;" and illustrates the effect of narrow views of policy, of the doctrine of "the omnipotence of Parliament," and of the consequent unfamiliarity with questions of general jurisprudence, upon judges of the greatest vigor of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country.

Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a court, not bound by it as authority, to overrule or disregard its own decisions.

The provision of the Gen. Sts. c. 107, § 25, forbidding the guilty party to a divorce to contract another marriage, during the life of the other party, without leave of this court, on pain of being adjudged guilty of polygamy, does not create a permanent incapacity, like one arising from consanguinity or affinity. It is rather in the nature of the imposition of a penalty, to which it would be difficult to give any extra-territorial operation. *West Cambridge v. Lexington*, 1 Pick. 506, 510, 512; *Clark v. Clark*, 8 Cush. 885, 386. Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State according to its laws, at least without proof that the parties went into that State and were married there with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment is in due form. See *Commonwealth v. Putnam*, 1 Pick. 136, 139; *Commonwealth v. Hunt*, 4 Cush. 49.

*New trial ordered.*¹

KINNEY v. COMMONWEALTH.

COURT OF APPEALS OF VIRGINIA. 1878.

[*Reported 30 Grattan, 858.*]

CHRISTIAN, J.² The plaintiff in error was indicted in the county court of Augusta County for lewdly associating and cohabiting with Mahala Miller. He was found guilty. . . . The Commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and State of Virginia, did live and associate together as man and wife; that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the State of Virginia, regularly domiciled in the county of Augusta, left their own State for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this State to live, and have since lived together as man and wife in said county of Augusta. The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said district.

¹ *Acc. Scott v. A. G.*, 11 P. D. 128; *Poundsford v. Johnson*, 2 Blatchf. 51; *Phillips v. Madrid*, 83 Me. 205, 22 Atl. 114; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *S. v. Shattuck*, 69 Vt. 403, 38 Atl. 81. *Contra*, *Williams v. Oates*, 5 Ire. L. 535; *Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (but see *Van Storch v. Griffin*, 71 Pa. 240, not cited in the later case); *Pennegar v. S.*, 87 Tenn. 244. And see *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461. — Ed.

² Part of the opinion is omitted. — Ed.

The court . . . instructed the jury as follows: "That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well-known public policy, and is therefore no bar to this prosecution; to which opinion . . . the defendant, by his counsel, excepts." . . .

The sole question submitted by this bill of exceptions for the adjudication of this court is, Whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said district," as certified in the certificate of facts, is a bar to this prosecution? It is conceded that a marriage in this State between a white person and a negro is void. It is not only prohibited by the statute law, but penalties are imposed for its violation. The first section of chapter 105, Code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned, are voidable only; that is, declared to be void only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriages within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under the third section of chapter 192, which denounces certain penalties against marriages of parties within the prescribed degrees of consanguinity or affinity. But marriage between a white person and a negro is declared by statute to be absolutely void without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this State between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded, under our laws, as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offence.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this State? It is admitted that Andrew Kinney and Mahala Miller had their domicile in Augusta County, in this State; that they remained out of the State only ten days after their marriage, and returned here, and that this county is still their domicile.

It is plain to be gathered from the whole record, if not indeed admitted, that these parties, knowing they could enter into no valid marriage contract in this State, went to the city of Washington for the purpose of evading the statute law of this State; were there

married, and in a few days returned to this State. They never changed nor designed to change their domicil. It was here then; it is here now.

The important question, and one of first impression in this State, is: Does the marriage in the District of Columbia, made *in fraudem legis* of this State, protect the parties in a prosecution in this State for a violation of its penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well-being and social order of this State? Must the *lex loci contractus* or the *lex domicilii* prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality, and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error, in the ingenious and able argument which he addressed to this court, that conceding the power of every State and country to pass such laws, yet they never act *extraterritorial*, but must be confined, with rare exceptions, to such marriages as are contracted and consummated within the State where they are prohibited. He invokes for his client in this case the rule laid down by jurists and text-writers, that "a marriage valid where celebrated is good everywhere."

This is undoubtedly the general rule. But there are certain exceptions to this general rule, and while in its application and the affirmation of certain exceptions thereto, there was for a long time much confusion in the authorities and conflict in the cases, I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself.¹ . . .

Whatever conflict of authority there may have been on this subject, it may now be affirmed, since the decision of *Brook v. Brook*, 9 H. L. C. 193, that in England, a marriage prohibited by law in that country, between parties domiciled there, and declared by act of Parliament to be absolutely void, is invalid there no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana, and Tennessee. See *Williams v. Oates' ex'or*, 5 Ired. R. 535; *State v. Kennedy*, 76 North Car. 251; *State v. Ross*, 76 North Car. 242; 10 La. Ann. 411, *Dupre v. Boulad's ex'or*.

Whenever the question has arisen in the Southern States, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a State where such marriages are not

¹ The court here cited Story, Conflict of Laws, § 113; *Brook v. Brook*, 9 H. L. C. 193. — Ed.

prohibited, is void in the State of the domicile, and when they go to another State temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this State. It is now so declared by statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute, the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy, — a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriage between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another State or country should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void. No State will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the State whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of *Medway v. Needham*, 16 Mass. R. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were there married, and returned to Massachusetts. The Supreme Court of that State held the marriage to be valid, and declared, in an elaborate opinion, that "a marriage which is good by the laws of the country where it is celebrated, is valid in every other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will nevertheless be valid in the country in which the parties live."

In commenting on this case, the lord chancellor, in *Brook v. Brook supra* (219), says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which

the forms only of celebrating the marriage in the country of celebration and the country of domicile were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I, myself, must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham*, cannot be treated as proceeding on sound principles of law.

"The province or State of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds, pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."

With such condemnation, from so high a source, of this decision as authority, and when it is opposed by the decisions of our sister Southern States above referred to, and contrary to sound principles of law, I think, though a case exactly in point upon its facts, it can have but little weight in forming our judicial determination of the question before us in this case.

There is another American case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case, *Stevenson v. Gray*, reported in 17 B. Monr. R. 193. That was a marriage between a nephew and his uncle's wife. Such a marriage was prohibited in Kentucky, but not in Tennessee. The parties went into Tennessee, and were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is to be noted that such marriages are not declared by the Kentucky statute absolutely void, but voidable only — that is, to be avoided by judgment of a district court or court of quarterly sessions. The reasoning of the judge who delivered the opinion of the court in that case, shows that he treats the case of a marriage voidable only, and not *ipso facto* void. If such marriage has been declared absolutely void by the Kentucky statute, the decision of the court, no doubt, would have been different.

In the seventh edition of Story's *Conflict of Laws*, p. 178, the editor adds a section in which he says: The limitation defined by Lord Campbell, chancellor, in *Brook v. Brook*, is certainly characterized by great moderation and good sense; that while the form of the contract,

the rites and ceremonies proper or indispensable for its due celebration, are to be governed by the laws of the place of the contract or of celebration, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence, if the incapacity of the parties is such that no marriage could be solemnized between them . . . and, without changing their domicil, they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say that a proper self-respect (of the State or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail.

I have thus considered, at length, the authorities, English and American, on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order, and the best interests of both races. The public policy of this State, in preventing the intercommingling of the races by refusing to legitimate marriages between them, has been illustrated by its legislature for more than a century. Every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the State. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished Southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by the statutes of this State, is invalid here, and that said marriage was a mere evasion of the laws of this State, and cannot be pleaded in bar of a criminal prosecution here.

If the parties desire to maintain the relations of man and wife, they must change their domicil and go to some State or country where the laws recognize the validity of such marriages.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court affirming the judgment of the county court, and that both be affirmed by this court.

The other judges concurred in the opinion of Christian, J.

*Judgment affirmed.*¹

¹ *Acc. S. v. Tutty*, 41 Fed. 753; *Dupre v. Boulard*, 10 La. Ann. 411; *S. v. Kennedy*, 76 N. C. 251. But see *Pearson v. Pearson*, 51 Cal. 120. — Ed.

DE BAUFFREMONT v. DE BAUFFREMONT.

COURT OF PARIS. 1876: COURT OF CASSATION. 1878.

[*Reported Dalloz Jurisprudence*, 1878, II 1; 1878, I 201.]

HENRIETTA VALENTINE DE RIQUET, countess of Caraman-Chimay, Belgian by birth, married the Prince de Bauffremont, a French subject. By a judgment of the Civil Tribunal of the Seine, April 7, 1874, rendered upon the petition of Mme. de Bauffremont, and confirmed by a judgment of the Court of Paris, Aug. 1, 1874, a judicial separation was decreed between the spouses. Afterwards, on May 8, 1875, Mme. de Bauffremont became naturalized without her husband's authorization, in the German duchy of Saxe-Altenburg. Then, taking advantage of the German law, which admits divorce, and it would seem considers Catholic spouses judicially separated as divorced, she married, on October 24, 1875, before the officer of civil status at Berlin, the Prince de Bibesco, a Roumanian subject. The Prince de Bauffremont, before the Tribunal of the Seine, began this action to have declared null the marriage and the act of naturalization of which we have spoken. This petition was granted by a judgment of March 10, 1876.¹ The Princess de Bauffremont appealed.

THE COURT. Henrietta Valentine de Riquet, countess of Caraman-Chimay, Belgian by birth, became French according to Article 12 of the Civil Code, by her marriage with the Prince de Bauffremont, a subject of France. Since judicial separation relaxes without destroying the tie of marriage, the judgment of separation pronounced in France upon her demand could not make her lose the nationality which she had acquired; she remained French since she remained the wife of the Prince de Bauffremont. Granting that she is freed from the duties of cohabitation, and that from this relative freedom one may conclude (reserving the right to consider motives and circumstances) that she has the power of choosing a domicile where she pleases, even in a foreign country, it does not follow that she may likewise, of her own will without her husband's authorization, change her nationality. The French law, which has become her statute personal, remains always fixed to her person, and follows her wherever she fixes her residence or her domicile. The necessity of her husband's authorization, except in simple acts of administering her property, is a legal one, as a result of the power with which the husband remains invested after a judicial separation. The change of nationality forms no exception; all the more where, as in this case, the wife attempts it, by favor of a foreign law not her own, as a means of legally changing her judicial separation into a divorce against her husband's will

¹ The judgment of the Tribunal of the Seine, and part of the case involving a mere question of procedure, are omitted. — Ed.

and against the provisions of the law of France. Supposing this foreign naturalization possible, the effect of it would be immediately annulled by the marriage, still existing, which would impose her husband's nationality on her; she would therefore have changed her nationality only to regain at the same moment (at least in the view of the law of France, by which we are governed) that which she had vainly tried to shake off.

If the act of naturalization in question should be regarded as an act of public law which a foreign State, making use of its sovereign rights, is free to accomplish, independently of marital authorization, we must at the same time recognize that the question relative to the personal capacity of the woman, as a married woman, to contract a second marriage before the dissolution of the first, is put beyond the power of her domicile to affect it. No effect can be made on the prior rights of the husband, a third party, by this act of naturalization; which consequently cannot be set up against him, no matter what its regularity and force, by the law of the foreign State, may be in other respects. The French courts cannot consider, either to declare the act valid or null, the reasons of reciprocal respect due between the two sovereignties.

It matters little, in fact, whether this naturalization could regularly take effect either with or without the husband's consent. Even if he had given express authority to his wife, she could not be permitted to invoke the law of the State where she had obtained her new nationality, to avoid the application of the French law, which alone governs the effect of the marriage of its subjects, and declares the tie indissoluble. It is a question of the most solemn and important of contracts, which not only cannot be broken against the will of one of the contracting parties, but never even by the mutual consent of the spouses. The Princess de Bauffremont would vainly have acquired by her own will a foreign nationality; her husband, remaining French, would vainly have given her express authority to do so. The reciprocal character and the indissoluble tie of marriage prevent in both cases that either the wife alone or even both spouses together (which is not the case here) should elude the provisions of public order of the French law which governs them.

For these reasons, the judgment appealed from is amended so far as it declared null the act of naturalization of May 3, 1875, which should only be declared incapable of being set up against the husband; in other respects the judgment is confirmed.

Mme. de Bauffremont appealed.

THE COURT. . . . The judgment appealed from was not called upon to decide, and did not decide, upon the regularity and legal force, in Germany and according to German law, of these acts done at the sole will of the appellant. Taking only the point of view of the French law, which in fact determines the question and is binding on the

parties, it decided that even had she been authorized by her husband, the appellant could not invoke the law of the State where she had obtained a new nationality, by favor of which, transformed from her condition of woman separated from her husband to that of one divorced, she could elude the French law, which alone governs the effect of the marriage of French subjects and declares the tie indissoluble.

Adopting the findings of the judges of first instance, it has also recited that the appellant solicited and obtained this new nationality not to exercise the rights and fulfil the duties which would be hers in establishing her domicile in the State of Saxe-Altenburg, but with the sole purpose of escaping the prohibitions of the French law by contracting a second marriage, and then abandoning the new nationality as soon as it had been acquired.

In deciding in these circumstances that acts thus done in fraud of the French law and in despite of obligations previously contracted in France could not be set up against the Prince de Bauffremont, the judgment appealed from was given in conformity to the principles of the French law on the indissolubility of marriage, and violated no provisions of law as alleged by the appeal.

Appeal dismissed.

PRINCE FREDERICK OF SAYN-WITTGENSTEIN-SAYN v.
PRINCESS LUDWIG.

REICHSGERICHT. 1880.

[*Reported 2 Entscheidungen des Reichsgerichts, Civilsachen, 145.*]

PRINCE LUDWIG of Sayn-Wittgenstein-Sayn married in the year 1867 Maria Lilienthal, daughter of the banker Lilienthal of Berlin. The marriage was celebrated on December 6, 1867, at Versoix, in the Canton of Geneva, by a civil act, followed in France by a religious marriage. After the death of Prince Ludwig without issue, in 1876, Prince Frederick, his brother, brought this action against the widow in the court at Ehrenbreitstein, praying that the defendant might be enjoined from any longer bearing the title of Princess Sayn-Wittgenstein-Sayn, and from using the coat of arms of the princely family of Wittgenstein.

The plaintiff based his case on the ground that his brother and himself belonged to the high nobility, and to the Prussian peerage, while the defendant was of the lower burgher class; the marriage of his deceased brother with her was therefore a misalliance (*Missheirat*) according to the family laws of the Wittgensteins, as well as according to the doctrines of the German law and of the law of the order of princes. As a result, the defendant did not enter into the rank and

husband, and had not the right, which depends upon membership in the family, to use the title and the arms.

The defendant maintained that the law of the Canton of Geneva, in which her husband took up his domicile with her after the celebration of the marriage, should be applied.¹

The defendant was condemned in the Court of First Instance, according to the plaintiff's prayer, and the decision was affirmed by the appellate Court at Arnsberg. The defendant appealed from this judgment, but the appeal was rejected by the Reichsgericht for the following reasons.

THE COURT. In agreement with the judge of First Instance the Appellate Court held that for the decision of this suit the Swiss law, that is the existing law of the Canton of Geneva, did not apply, but the German law of the Order of Princes. This application is entirely correct. Whether we should agree with the reasons put forward by the judges below we need not decide; nor need we further examine the appellant's arguments against them, since their application in the present case arises from the special nature of the principles here brought in question, without considering what principles one should regard as fundamental for the decision of questions involving the conflicts of laws with regard to questions of status and family law.

The late husband of the defendant, Prince Ludwig of Sayn-Wittgenstein-Sayn, belonged without doubt to the high nobility of Germany and to the Prussian peerage. For the establishment of his legal relations generally, as for the decision of the question with what person he may contract a marriage having full civil effects, the special principles would be applied which are established in the law of the Order of Princes for the high nobility, the independent provisions of the family law of the Wittgensteins and the common prince-law of Germany. These principles are in their subject and in their historical development not of a territorial but of a personal nature, and determine the decision of the legal rights of peers without regard to their present domicile, even if it be outside Germany. The State of Prussia decrees to the peer, wherever he is domiciled, as part of and along with his peerage, the common German prince-law and the special law of peerage as a personal law. This is a substantial incident of peerage, and neither Article 14 of the German Constitution nor the royal Prussian statutes regulating the legal rights of peers make them dependent on domicile. Even should the foreign State in which a Prussian peer has established his domicile not recognize the special or the common German prince-law as his personal law, the Prussian State cannot refuse this recognition. For the Prussian courts in determining the legal rights of members of the princely family of Sayn-Wittgenstein-Sayn the existing prince-law of that house governs, equally whether the member in question has established his domicile in Germany or in a foreign country. For the decision of the question, what

¹ Only so much of the case as concerns this ground of defence is given. — ED.

were the effects of the marriage contracted by the defendant with her late husband, it therefore seems to be of no importance whether the latter, who at the time of his marriage was a Prussian subject, had his domicil in Geneva or in Prussia. . . .

If inquiry is made, what consequences the marriage of a member of the high nobility with a woman of the burgher class has, there can be no doubt that such a marriage, so far as the ordinary legal presumptions go, is a complete, true marriage. These consequences, however, do not extend to all civil relations; and, in particular, the wife here does not enter into the rank of her husband, but retains her former rank. She does not participate in the privileges of her husband's rank; she is not empowered to use the princely or ducal title and arms as a sign and representation of her husband's rank and position and the appurtenances of a family of the high nobility.

ANONYMOUS.

REICHSGERICHT. 1887.

[Reported 42 *Seuffert's Archiv*, 303.]

PETITION for nullity of marriage. The parties, both German, the husband a Protestant and the wife a Catholic, had been married in Buenos Ayres, where they were temporarily resident, by a German Evangelical minister, the requirements of the Argentine Code not having been complied with.¹

THE COURT. In the Appellate Court a new ground of complaint was added, that the marriage had not been celebrated in the form required by the law of the place of celebration, namely, Buenos Ayres: the fact being that it had indeed been consecrated by the resident pastor of the German Evangelical congregation, but had not been celebrated directly afterward before the competent Catholic priest. This ground of complaint also was properly rejected by the Court of Appeal. It is, to be sure, laid down by some writers that a marriage contract can be properly completed only in the form prescribed by the law of the place of celebration, (*e. g.* by von Sicherer, *Personenstand und Eheschliessung*, p. 349; von Friedberg, *Kirchenrecht*, 2d ed. § 156, p. 349); but this opinion, although it has become valid for marriages entered into within German territory by a positive enactment in § 41 of the *Reichsgesetzes*, February 6, 1875, does not agree with the principles of the common law in regard to the local sovereignty of principles of law. According to these the proposition *locus regit actum* is valid also in the case of a marriage contract: this, however, *allows* according

¹ This short statement of facts is that of the editor. The discussion by the court of the first ground of nullity alleged is omitted. — Ed.

to the prevailing view, which is also adopted by the Reichsgericht (Entsch. i. 323; xiv. 184), not only the application of the form prescribed at the place of the legal action, but at the same time concurrently the form of the law which is otherwise decisive of the action in question. Therefore it is properly assumed that the marriage may be legally contracted either in the form of the place of celebration or in that of the place which is decisive for the personal relations of the man. Von Bar, Internat. Recht, p. 324 ff.; Stobbe, Deutsches Privatr. (2d ed.) I. § 31, p. 222 ff.; Dernburg, Preuss. Privatr. I. § 27; III. § 4, and Pand. I. § 48, p. 106.

This place is (according to the common law of Germany as held by the Reichsgericht, in agreement with the prevailing doctrine) the domicil of the husband. He who will attack as null an actually existing marriage entered into in a foreign country on account of a legal defect of form of celebration must above all things distinctly allege under the sovereignty of what law the husband personally stood at the time of the marriage. In other words, he must aver either where he at that time had his domicil; or if (according to the law specially deciding the question) not residence but nationality should govern the case, then to what State the husband at the time owed allegiance. When, as in the present case, no averments whatever are made upon this point, the judge who has to decide the petition for nullity (who according to sections 568 and 13 of the Code of Procedure is, for married parties who live within the German empire, always the judge of the present domicil of the man, or in case of doubt every judge) has to apply his own law. Here it is applied as the law which is concurrent with the *lex loci actus* in governing questions of form, according to the meaning of the rule *locus regit actum*. As a result of this, the application by the Oberlandesgericht of the law which at the time of the marriage prevailed at Hamburg, was clearly justified; though, it is true, the reason given in the judgment appealed from, — namely, that the judge in the case of suits for nullity of marriage and for divorce must always apply only his own law, — was subject to serious doubt.

Furthermore, the assumption of the Appellate Court that by the marriage of the parties in 1864, in Buenos Ayres, by the resident Evangelical pastor, the requirements of the law then prevailing in Hamburg as to the form of the marriage contract were satisfied, is in agreement with the deciding principles of law. The first point was correctly laid down, that it was sufficient in Hamburg, as a chiefly Protestant State, if a mixed marriage between a Protestant man and a Catholic woman was entered into only in the form of the common German *Protestant* church law; and further, it is wholly beyond a doubt that according to Protestant church law the validity of the marriage contract is not dependent upon the fact that he was the proper officiating clergyman (which here, by the way, is not alleged), but the marriage by any settled minister was enough. At any rate,

a valid marriage may be celebrated by one who is not deprived of the right to this function by the law of the place of his settlement; and there was no such deprivation by the Argentine law, according to the whole spirit of its provisions on this subject.

LHERMITE v. CHOISI.

CIVIL TRIBUNAL OF THE SEINE. 1899.

[Reported 27 *Clunet*, 350.]

THE TRIBUNAL. On the 14th of September, 1889, Charles Alexis Choisi, an adult thirty years of age, married Mrs. Josephine Verheydt-Deveux before a justice of the peace of the parish of Lafayette, in the State of Louisiana; and on the 12th of June, 1895, he had this union celebrated by a religious service at Bay Saint-Louis (America); but this marriage was not preceded in France by the publications required by articles 68 and 170 of the Civil Code. Of this union on April 12, 1890, one daughter was born, Hermance-Augustine, called Lucy. Charles Alexis Choisi died on June 19, 1897, at Pearlington, in the State of Mississippi. His sisters, Mmes. Lhermite and Huau, have brought against his widow an action to have his marriage declared null as clandestine, and consequently to have his daughter excluded from the succession to his mother, Mme. Choisi.

It is not denied that the marriage of Charles Alexis Choisi was celebrated according to the accustomed forms in the country where it took place. The suit for nullity, according to the terms of the demand, was based only on the violation of Article 170 of the Civil Code. Frenchmen may marry abroad on condition of making, in France, the publications prescribed by our Code; it is necessary to discover the punishment for breach of this condition in order to reach the proper solution of this case. The spouses not having fulfilled the condition, are evidently subject to the penalty established by Article 192, that is, a fine in proportion to their fortune; but does it also follow that the marriage is null? In questions of marriage, nullity is not to be declared by implication; hence in the absence of an express provision attaching the penalty of nullity to the failure to observe a formality that does not go to the essence, it is not permissible to annul a contract so solemn. Article 170 provides, it is true, that the marriage shall be valid if it was preceded by publication, but it does not expressly pronounce it null if this condition is not fulfilled, and one cannot infer it by an argument *a contrario*. Consequently the mere omission of publication in France does not cause nullity of a marriage celebrated abroad.

It would not, however, be the same if the spouses, in omitting the publication in France, had the purpose of keeping their union concealed from the eyes of the French public. It appears by the statement

of their case at the hearing that the plaintiffs rely upon this clandestinity; and moreover it alone can give them a cause of action by Article 191, since no text gives collaterals the right to rely on the mere failure to carry out Article 170. Under these conditions it is proper to consider whether the circumstances which preceded, accompanied, and followed the celebration of the marriage in question show on the part of the spouses the fixed intention to perpetrate a fraud on their national law.

It is shown by the documents in the case that Choisi left France in 1884, to establish himself in America, with the consent of his father, who furnished him the money for his journey and continued for several years to send him aid. He found a situation in Louisiana, where he fixed his principal establishment. After that Madame Verheydt-Deveux, with whom he had lived in concubinage at Paris since 1882, came to join him. Furthermore it is proved that Choisi before being married by a public official to Mme. Deveux, in 1889, carried out formalities which show that the intention of marriage had been duly published. He seems to have done the same before the religious ceremony of June 12, 1895. Finally, up to the death of Choisi the spouses had possession of a status that conformed to their act of marriage; and the child, the issue of their union, appears always to have been treated as a legitimate child.

It results from the evidence stated that Choisi certainly did not leave France with the purpose of marriage, to escape the provisions of the French law. At the time of the marriage he had long lived in Louisiana, and had not preserved a domicile in France. His union, surrounded by the formalities required in that country, was not clandestine, and in the eyes of every one gave him at once the quality of legitimate husband of Mme. Verheydt-Deveux. Under these circumstances it is impossible to find that Choisi, who had reached the age when he could marry without his mother's consent, had the fixed intention, in failing to have *actes respectueux* notified, of concealing his marriage from the French public, and of perpetrating a fraud upon his national law; above all, since that law does not pronounce the nullity of a marriage contracted by a son in defiance of the provisions which require *actes respectueux*.

In such a situation the tribunal would commit an inconceivable excess of rigor, in spite of the serious wrongs of Choisi toward his family, if it allowed an action which would do so profound an injury to the status of a young girl, a minor, who has up to this time enjoyed the privileges of a legitimate child.

For these reasons declares Mmes. Lhermite and Huau and their husbands proper parties to sue, but their suit not maintainable; and dismisses the suit with costs.¹

¹ *Arr. 26 Clunet*, 1042 (Brussels, 8 Dec. '98). Where a desire to evade the national law is shown, the marriage is invalid. 21 *Clunet*, 1074 (Austria, 26 Apr. '92); 26 *Clunet*, 799 (Paris, 3 March, '98). — ED.

SECTION IV.

LEGITIMACY AND ADOPTION.

SHAW v. GOULD.

HOUSE OF LORDS. 1868.

[Reported Law Reports, 3 English and Irish Appeals, 55.]

JOHN WILSON, of Stenson, in the county of Derby, made his will, dated the 27th of February, 1832 (duly executed to pass real estate), and after directing payment of debts, etc., bequeathed to trustees one moiety of his personal estate in trust for his great-niece, Elizabeth Hickson, for her life, and after her death upon certain trusts for the benefit of her child, or children, or issue; and in case she should not have any child or issue, upon trust for his nephew, Ambrose Moore, his executors, etc. He devised his real estate to trustees during the life of his great-niece, Elizabeth Hickson, for her separate use, remainder to the trustees for 500 years, to raise portions for her younger children, and, subject thereto, to the first son of the body of the testator's said great-niece lawfully begotten, and the heirs of his body, etc., remainder to every other son of the body of his said great-niece lawfully begotten, and his heirs successively, etc., remainder to the use of the daughters of Elizabeth Hickson lawfully begotten, as tenants in common in tail, remainder to the use of Ambrose Moore for life, remainder to his first and other sons in tail.

On the 10th of June, 1828, Elizabeth Hickson, being then about sixteen years of age, was induced by the fraud of a person named Buxton, to contract a marriage with him. The marriage was never consummated, and for his fraudulent act Buxton was indicted, and convicted, and sentenced to three years' imprisonment. No formal dissolution of this fraudulently procured marriage ever took place, and in December, 1838, a formal deed of separation was executed by Buxton in consideration of a sum of money then paid to him, and of the grant of an annuity for life. In 1844, a Mr. John Shaw, who was then studying for admission to the English Bar, addressed proposals of marriage to the lady, who, notwithstanding what had passed, still continued to be called Elizabeth Hickson, and his proposals were favorably received, but it was doubted whether any lawful marriage could take place between them until that which had once been solemnized with Buxton was formally dissolved.

Buxton, after undergoing his sentence, had cohabited in the county of Derby with one Sarah Lant. A suit for a divorce on the ground of adultery was, in June, 1844, instituted by Elizabeth Buxton, or Hick-

son, in the Arches Court of Canterbury, but was not persevered with. Negotiations were then opened with Buxton to induce him to go to Scotland for a time necessary to give the Scotch courts jurisdiction in a divorce suit. These negotiations resulted in an agreement that Buxton should go to Scotland, and remain there a certain time. He was to receive £40 for his expenses: in case he should be divorced he was to receive £250 within three months from the death of a person named in the agreement, with interest thereon until that time; this sum "to be forfeited if he gave or caused to be given such information as would be prejudicial to the divorce." He was, on the divorce being pronounced, to receive a farther sum then in the hands of the lady's trustees, to retain his annuity, and if he had to stay in Scotland more than eight weeks he was to receive £5 a week in addition. At the end of November, 1844, Buxton went to Scotland, and took up his residence first at Dumfries, and then at the neighboring village of New Abbey, where he continued until the end of January, 1845. On the 16th of January, 1845, he was served with a summons in a suit for a divorce issued out of the Court of Session, at Edinburgh, at the suit of Elizabeth Buxton. This suit was not prosecuted to a decree, but another was commenced in November, 1845, to which Buxton put in defences that he and his wife were natives of England, that the marriage was English, that the proper domicile of the parties was England, and that the Scotch court had no jurisdiction to pronounce a divorce. The court, however, proceeded with the suit, in which a decree, declaring the marriage dissolved on the ground of adultery, was pronounced in March, 1846.

In June, 1846, John Shaw and Elizabeth Hickson were in due form married in Scotland. Mr. Shaw, instead of returning to England and coming to the English Bar, became an advocate at the Bar of Scotland, and was thenceforth domiciled in that country. He resided in that country up to the time of his death, which happened in September, 1852. Buxton, who had at once returned to England, pre-deceased him by several months. There were three children of this union, the appellants in the present case. Mrs. Shaw died on the 28th of July, 1863.

On the 3rd of July, 1865, the appellants, by their next friend, presented a petition to the Lord Chancellor, praying for maintenance out of the trust funds which had been paid into court under the Trustee Relief Act. On the 14th of March, 1865, Ambrose Moore, and other parties, claiming to be interested in these funds in case the appellants should be declared not entitled to them, presented a petition in the nature of a cross-petition, setting forth their own claims, and denying those of the appellants, alleging that the appellants were not the children lawfully begotten of the said Elizabeth Hickson, for that she still continued the wife of Buxton, the divorce from him having been obtained by collusion, and being in itself invalid for the purpose of dissolving an English marriage.

The two petitions came on together for hearing before Vice-Chancellor Kindersley, who, on the 7th of December, 1865, made an order refusing the petition of the appellants, and directing that the funds in court should be applied for the benefit of the respondents. This was the order appealed against.¹

LORD CRANWORTH. . . . If the parties in this case had been Scotch, and not English, and if all which occurred had occurred not in England but in Scotland, there would, I presume, have been no question on the subject. If Thomas Buxton, being a domiciled Scotchman, had married in Edinburgh, Elizabeth Hickson, being a domiciled Scotchwoman, and afterwards, while their Scotch domicile continued, she had obtained a decree of divorce in the Court of Session, and then had married John Shaw, the issue of that marriage would certainly have been legitimate. The argument of the appellants is, that the consequence must be the same, though the parties were at the time of the first marriage domiciled in England, and were married there. The question, it is contended, is, whether, when the second marriage was contracted, the parties to it had the capacity to contract marriage; in other words, whether the effect of the divorce was to enable them to enter into a valid contract of marriage, which, but for the divorce, they certainly could not have entered into. The whole, therefore, turns on the validity of the divorce. Now, the law of Scotland seems clear that a residence in Scotland for forty days makes that country the *domicilium fori* of any person so residing in the country, in which, for the purposes of litigation, he is to be treated as being domiciled. And it is assumed that this is true whatever be the nature of the litigation; that it holds equally in cases the decision in which may involve the personal status of those who may claim through the litigant parties; so also where it is a mere dispute between the litigant parties themselves. Taking this, however, to be the undoubted law of Scotland, the question is, whether that principle is one which this country is bound to recognize. I think it is not.

The facts of this case do not raise the question as to what would have been the status of these children if Buxton and Elizabeth Hickson, though married at Manchester, had always been Scotch persons, and had always lived in Scotland; or even what it would have been if, before the proceedings for the divorce, Buxton had actually *bona fide* quitted England permanently, and established himself in Scotland, so as to have acquired a Scotch domicile for all intents and purposes. It may be that in these circumstances the courts of this country would recognize the status of these children, so as to entitle them, after the death of their mother, to the fund given to her children; which no doubt must be construed as meaning her legitimate children. But on that point I express no opinion. . . .

The important differences on the subject of marriage and divorce which exist in the different parts of the United Kingdom often give

¹ Arguments of counsel and parts of the opinions are omitted. — Ed.

rise to perplexing difficulties, and exhibit a state of our law little creditable to us. But these difficulties make it more than usually incumbent on those who have to administer the law to take care that wherever a clear line has been drawn by judicial decision the course which it has marked out should be rigidly followed. Now, whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in Scotland resting merely on a *forum domicilii*, had, at all events before the passing of our English Divorce Act in 1857, any effect in England on the validity of an English marriage, is established on the highest authority. . . .¹

These cases clearly decide the one now before the House, for if the first marriage here was not dissolved there could not have been a second marriage. Till the first was dissolved there was no capacity to contract a second. If after the second marriage Buxton and Elizabeth had again cohabited, and there had been issue, that issue would certainly have been legitimate by the law of England, and it cannot be argued that the issue of both unions could share together.

The view which I take of this case relieves me from the necessity of considering whether the resort to Scotland for the purpose of the divorce, and the arrangements made among the parties for bringing about that object, were or were not of such a character as to taint the whole of the proceedings with fraud; I am not at all satisfied that they were, but I am glad to be relieved from the necessity of deciding on such a ground.

There is only one farther observation which I decide to make: it is this: In saying that the Scotch courts have no power to dissolve an English marriage where the parties have only gone to Scotland for the purpose of obtaining there a *domicilium fori*, I do not mean to express any opinion as to what might be the effect of a divorce so obtained considered merely as a Scotch question. In the anomalous state of our laws relating to marriage and divorce, it may be that such a proceeding may be valid to the north of the Tweed, but invalid to the south. And I am painfully sensible of the inconveniences which may result from such a state of the law. But it must be for the legislature to set it right. The authorities seem to me to show clearly that whatever may be the just decision of the Scotch courts in such a case as the present, on this subject of divorce according to Scotch law, it is one in which this country cannot admit any right in them to interfere with the inviolability of an English marriage, or with any of its incidents. To do so would be to allow a prejudice to English law to be created by the decisions of what, for this purpose, we must call a foreign law, thus going beyond what, in the passage cited from Huber, any country is called on to do.

On these short grounds I am of opinion that there was no foundation for this appeal, and I move your Lordships that it may be dismissed.

¹ Lord Cranworth here cited *Lolley's Case*, R. & R. 237, 2 Cl. & F. 567; *Conway v. Beazley*, 3 Hagg. Ecc. 639; *Dolphin v. Robins*, 7 H. L. C. 390. — Ed.

LORD CHELMSFORD. . . . Whether the appellants answer the descriptions respectively of "son lawfully begotten," and of "children," depends upon whether their parents were lawfully married; and this again depends upon the effect of a divorce in Scotland dissolving the marriage of their mother with Thomas Buxton in England. . . .

Vice-Chancellor Kindersley, in giving his judgment against the validity of marriage, said, "that to assert the validity of the Scotch divorce, upon which alone the validity of the marriage with Shaw depends, is to assert that the Court of Session is not bound by the principle of international law; that all questions as to the validity, or incidents, or consequences of a marriage, are to be decided according to the *lex loci contractus*, i. e., the law of the country where it was solemnized."

But in a suit for a divorce the validity of the marriage is not in question, and the violation of the marriage contract can hardly be called one of the "incidents" or "consequences" of it. If a divorce is to be regarded as a remedy for the breach of the matrimonial contract, it is a general principle of international law that all remedies depend upon the *lex fori*, and not on the *lex loci contractus*.

A question of greater difficulty which has been argued in this case is: What is the effect of a Scotch divorce upon an English marriage, where the married parties do not afterwards become domiciled in Scotland, nor have resorted thither with the design of invoking the jurisdiction of the court, but where, happening to be in the country, one of them applies for and obtains a decree of divorce?

Since the decision in *Lolley's Case* the courts of Scotland have from time to time asserted and exercised a jurisdiction to dissolve marriages which have taken place in England, and elsewhere than in Scotland, where the parties to them had acquired no permanent domicile in that country, but had merely continued there a sufficient time to give the courts jurisdiction. These cases have never been appealed to this House, so as to raise the question of the validity of such divorces in a form to require your Lordships to decide upon the existence of the jurisdiction according to the principles of Scotch law. I cannot, therefore, subscribe to the opinion expressed by my noble and learned friend, Lord Cranworth, in *Dolphin v. Robins*, "that it must be taken now as clearly established that the Scotch court has no power to dissolve an English marriage where the parties are not really domiciled in Scotland."

But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch courts to dissolve English marriages, the validity of the divorce of the appellants' mother from Buxton cannot be admitted, if it was obtained by concert or collusion.¹ . . .

It is possible that the Scotch courts might not have entertained the same view of the question of collusion which I have formed. But even if they had, it appears from the evidence of the Scotch advocates

¹ Lord Chelmsford held the divorce collusive. — Ed.

produced in this case that, according to the law of Scotland, reduction of a decree of divorce upon the ground of collusion cannot be pronounced after a year and a day from the date. I suppose, therefore, that the Scotch courts would sustain the decree of divorce, and would hold the subsequent marriage to be valid if they were brought into question before them. The counsel for the appellants therefore contend that the decree of divorce being irreversible, the marriage of the parents of the appellants was valid, and the status of legitimacy of the appellants being established in Scotland must be recognized everywhere.

They farther argued that, even assuming the marriage to be invalid, the appellants might still be legitimate. They ground this argument upon the law of Scotland, "which" (according to the evidence of the Scotch advocates, to whom I have previously referred), "from considerations of expediency and humanity, adopted the rule of the canon law, which recognized the legitimacy of children born of a putative marriage, — that is, a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment such as the prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage."

The authority of text writers was referred to upon this point, all of whom confine the ignorance which renders children of a void marriage legitimate to ignorance of some fact by the parents. In the present case there was no fact bearing on the validity of the second marriage unknown to either of the parties to it. They drew their conclusions from known facts, and acted upon their own judgment as to the correctness of the advice given them upon the subject of the decree of divorce. Although they may have proceeded *bona fide* upon this advice, still their case is not brought within the principle of the law as laid down both by the evidence and in the text writers, as the ignorance imputed is not of fact, but of law.

But if a constructive legitimacy of this kind would, under the circumstances, have arisen in Scotland, I cannot think that we could be bound to recognize it so far as to qualify the offspring of a void marriage to take under the description of "children" in an English will.

My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in England between parties having an English domicile which they never changed, and the divorce in Scotland having been obtained by preconcerted arrangement, the parties resorting in the Scotch courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion in the sense in which that term appears to have been employed in some cases of this description, I do not think that the tribunals of this country can regard a divorce thus obtained as binding on their judgment. It seems to me that this case cannot be distinguished from that of *Dolphin v. Robins*, 7 H. L. C. 390, decided by your Lordships, where the validity

of a will made in France depended upon the effect of a Scotch divorce upon an English marriage. In that case there was an agreement between the married parties to procure a divorce in Scotland, and the husband was to receive £12,000, which was to be forfeited in case he should by false or insufficient evidence prevent the divorce being obtained (for so I interpret the ambiguous and inaccurate language of the memorandum upon that subject). It was held that a divorce procured by the execution of this preconcerted arrangement was, as Lord Kingsdown expressed it, "mere mockery, and collusion from beginning to end."

In that case the husband was to forfeit the money he was to receive for assisting to procure the divorce "if he should prevent its being obtained by false or insufficient evidence." In the present case Buxton was to forfeit what he was to receive "in case he should give information prejudicial to the divorce." I think the cases exactly resemble one another.

Whatever may be the view of the Scotch courts as to the legitimacy of the appellants, your Lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will. It is clear that the words "son lawfully begotten" and "children" in the will in question can apply only to a legitimate son or to legitimate children, and that the appellants, not having the character of legitimacy according to English law, cannot take under these descriptions.

The decree appealed from must be affirmed.

LORD WESTBURY. My Lords, this case depends on the answer to the question, whether a marriage solemnized in England between two English subjects domiciled in England at the time, can be dissolved by the decree of a foreign tribunal.

According to the institutions of England as existing at the time of the alleged divorce, no such decree could have been obtained in any Court, for no forensic tribunal existed in England with jurisdiction to grant divorces *à vinculo matrimonii*. The foreign decree of divorce is adduced for the purpose of determining a question touching a right of property that has arisen in an English court of justice, and which must be decided by English law. It is therefore a question of English law, and the true inquiry is: Does the English law recognize and admit the finality of a foreign judgment divorcing, *à vinculo matrimonii*, English subjects who were married in England? The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the judge who pronounced it. It may there fix the legal status of persons and conclude the right and title to property; but it may still not be such a sentence as by the comity of nations (that is, by the general principles of jurisprudence which are recognized by the Christian States of Europe) has an extraterritorial effect and authority.

The first essential for the validity of a foreign decree is, that it should be pronounced by a court of competent jurisdiction between

parties who are *bona fide* subject to that jurisprudence. In the present case two English subjects who had married in England being desirous of obtaining a divorce, crossed the border into Scotland for the purpose of getting it. The wife sued the husband for a divorce in a court which was competent to exercise jurisdiction for such a purpose over those who were subject to it. But could this court, consistently with true principles, assert such jurisdiction over those who were not permanently residing within the limits of its authority? I am not looking at the simulated residence in Scotland with a view to holding the judgment collusive, but with reference to the question whether the Scotch court can justly assert that by such temporary residence it acquired a jurisdiction which the courts of another country ought to recognize and admit. It is perfectly competent to the courts in Scotland to fix a certain amount of residence as the condition for the exercise of its jurisdiction, and if that condition be fulfilled, it may proceed to pronounce a judgment that will be binding within its own borders; but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with rules of international public law.

The extent and limits of the comity of nations, or of the obligation which one nation is under to receive and admit the judgments of the courts of another country, are well defined in one of the axioms of Huber, who says: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" But if the court of a foreign country permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal status and obligations of husband and wife, which release they cannot obtain in the courts of their own country, it is plain that such foreign court is in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume, their original position. Can this be done without injury to the authority of such bordering power and to the rights of its subjects?

Social rights depend in very many cases upon the personal status and relations of individuals; that is to say, upon the relation of husband and wife, father and child, and all the relations which are consequent upon marriage, and if these relations as they exist cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of that country prejudiced, and its subjects injured, by permitting a foreign court to be invoked for the purpose of altering social rights and duties, which cannot be changed under their own laws, in their own courts of justice?

It is true that persons commorant in a foreign country, but without any intention of remaining there, are, whilst they are so commorant, subject to the laws of that country, and must yield obedience to them;

but that is a very different thing from a country permitting foreigners to resort to it for the sole purpose of getting released from the most solemn of all contracts, and the most important social obligations. Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving the marriage contract.

No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment, as having no extraterritorial force or validity. They are entitled to reject it, if pronounced by a tribunal not having competent jurisdiction; and they are *bound* to reject it, if it be an invasion of their own laws and polity.

But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor in his judgment, namely, that where, by the *lex loci contractus*, the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience and by tacit consent, are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of personal status depend on the law of actual domicile.

It is said by a foreign jurist of authority, Rodenburg, and his works are cited with approbation by many recent writers, "*Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solum modo Judici, et quidem Domicilii universum in illa jus sit attributum.*" This position, that *universum jus*, that is, jurisdiction which is complete and ought to be everywhere recognized, does, in all matters touching the personal status or condition of persons, belong to the judge of that country where the persons are domiciled, has been generally recognized.

The language of Boullenois, a French jurist of authority, is to the same effect. His position is, that the laws of a sovereign extend over persons domiciled *within* his territory, and over property which is there situate.

That this rule is one which is introduced by *ipsa rei natura ac necessitas*, is well illustrated and enforced by Lord Brougham, in his judgment in the case of *Warrender v. Warrender*.

If, as is certain, the domicile of origin may be effectually put off, and a new domicile acquired by persons who are *uni juris*, it must follow that such persons thereby become, to all intents and purposes, subject to, and entitled to the benefit of, the laws and institutions of the adopted country, in like manner as they were entitled and subject to the laws of the domicile of origin, and that without becoming aliens in their own native country.

Mr. Justice Story, in his book on the Conflict of Laws, § 205 n., cites a judgment delivered by the Supreme Court of Pennsylvania, in which, after observing that a *bona fide* domicile, in the strictest sense of the word, was essential to jurisdiction to pronounce a divorce *à vinculo matrimonii*, Chief Justice Gibson treats the British tenet of perpetual allegiance as the root of the English doctrine of the indissolubility of the marriage contract. I hardly need observe that this is an unfounded notion, and that the political maxim of *nemo potest exuere patriam*, which preserves the duty of allegiance notwithstanding the change of domicile, has nothing to do with the personal relations and rights of British subjects under civil contracts.

If it were permitted by this House to be supposed that the law of this country was to the effect stated by the Vice-Chancellor, viz., that the *lex loci contractus* enters into and forms part of the marriage contract, so that if, by the law of the country where the marriage is solemnized, and of which the parties are natural-born subjects, no divorce *à vinculo* can be granted, and such marriage is everywhere indissoluble, it would be a conclusion that would lead to the most startling results. Suppose two Roman Catholics, who, having married in Spain, afterwards became Protestants, and are *bona fide* domiciled in this country, where they reside for years, could it be held that the husband was bound by the *lex loci contractus* from seeking a divorce from his wife by reason of adultery committed during such residence? On the other hand suppose two Prussian subjects married at Berlin, where a divorce may be obtained for incompatibility of temper, could they, on becoming domiciled in England, claim a divorce on such a ground before the tribunals of this country, where such a ground of divorce is not judicially recognized? Many other cases might be put, but it is unnecessary to do so, for I apprehend there is no substantial authority for the position. In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but until the recent Divorce Act, this law was administered by Parliament alone, and although the decision of Parliament was in the form of an act or *privilegium*, and not of a judicial decree, yet the act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative act. The justice of divorce was recognized, but no forensic tribunal was intrusted with the power of applying the remedy. But the law and practice of Parliament were well known; and, in fact, this House acted as a court of justice. It cannot, therefore, be correctly said, that divorce *à vinculo matrimonii* was contrary to the principles and institutions of this country. It follows that the validity of a foreign decree of divorce must be ascertained in the same manner and on the same rules by which the conclusive effect of other foreign judgments has to be determined.

The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*.¹ . . .

It follows that the marriage of Mr. and Mrs. Buxton was legally subsisting at the time of the second marriage between Mrs. Buxton and Mr. Shaw; and that the second marriage was therefore void, and the issue of it cannot claim to be entitled by English law to the benefit of the trust previously declared for the children of Elizabeth Hickson.

But even if the first husband, Mr. Buxton, had been permanently domiciled in Scotland before and at the date of the decree for divorce, in which case the Scotch courts might have had jurisdiction, I should still have been of opinion that the decree was not binding, as having been collusively obtained. But I abstain from resting my judgment upon this ground, because I entertain a doubt whether collusion could be now used as a sufficient reason for setting aside the decree after the deaths of all the parties to the proceeding. . . .

For these reasons I am of opinion that the decree of the Vice-Chancellor was correct, and ought to be affirmed.

LORD COLONSAY. . . . When it is said in unqualified terms that a marriage duly celebrated in England, according to the rites of the English Church, ought to be regarded and treated by the courts of other countries as a contract involving the element of absolute indissolubility as of its essence, and ought not to be under any circumstances dissolved by decree of a foreign court; in short, that a foreign court has no power to dissolve an English marriage; that is a proposition in general or international law, and would require to be maintained by reference to recognized rules of international law, or general principles of jurisprudence. But although the proposition has been introduced into this case it has not been supported by any such reference, and I cannot assent to it as resting on any recognized rule of international law. It appears to me to involve more than one fallacy. It assumes as a basis that absolute indissolubility is an inherent quality of an English marriage, necessarily attaching to it under all circumstances. Then, building on that basis, it assumes that as regards international law the relation of husband and wife stands on the same footing as ordinary business contracts, and, farther, it assumes that the *lex loci contractus* must be the sovereign rule for determining all questions as to the rights, duties, and obligations arising out of that relation, and the remedy or redress to be given in the event of either party acting in violation of the contract.

¹ Lord Westbury examined *Lolley's Case*, 1 Russ. & R. 237; *Warrender v. Warrender*, 2 Cl. & F. 567; *Dolphin v. Robins*, 7 H. L. C. 390. — Ed.

I hold each and all of these assumptions to be more or less erroneous. Is it sound that absolute indissolubility is an inherent quality of marriage when celebrated in England according to the rites of the English Church? Is it so regarded even in England? I have heard no authority for that. . . .

The fallacies that have lurked in undefined notions of the indissolubility of English marriages, and the omnipotence of the *lex loci contractus*, being dislodged, what are the rules by which we should be governed in deciding this case? Assuming in the meantime that the case depends entirely on the reception (so to speak) to be given to the foreign decree of divorce, it is to be observed that the respondents deny that the decree is valid according to the law of the country in which it was pronounced. If we are to go into that inquiry we must deal with it upon the evidence, and the evidence, so far as it goes, is in favor of the validity of the decree. Of course I do not include in the evidence an opinion said to have been given by a witness, not in this cause, and which had due reference to the question of jurisdiction.

I therefore presume that we must deal with the case on the footing that the decree is, or may be, a valid decree of divorce in Scotland. Then why is that decree to have no effect given to it in England? not because the English marriage was absolutely indissoluble; not because the *jus gentium* restrains the courts of one country from dissolving a marriage celebrated in another country, or holds that the *lex loci contractus* is necessarily imported in its totality into whatever country the parties may go to. It must be because the circumstances of this case bring it within some exception recognized in general law, or because the law of England, irrespective of any rules of general law, refuses to give effect to such a decree. The main feature of the case in this view is that the parties, at least Buxton the husband, being a domiciled Englishman, having no connection with Scotland, went there for the purpose of giving to the Scottish court jurisdiction in the suit for divorce at the instance of his wife. I think that the English cases referred to, viz. *Lolley's Case* and *Conway v. Beazley*, and the case of *Dolphin*, are precedents to the effect that the courts of England will not recognize a decree of divorce obtained under such circumstances, and that, sitting in an English court, I am bound to respect these precedents so far as they go; and they may be sufficient for the decision of the present case. At the same time I may be permitted to say, that I am not so clear in my apprehension of the principle of general law on which those decisions proceeded.

It was said that a foreign court has no jurisdiction in the matter of divorce, unless the parties are domiciled in that country; but what is meant by "domicil?" I have observed that it is designated sometimes as a *bona fide* domicil, sometimes as a *real* domicil, sometimes as a *complete* domicil, sometimes as a domicil *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress

matrimonial wrongs, including the granting of a decree of divorce à *vinculo*, depends on there being a domicile such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law, on the ground of being *in fraudem legis*. But if you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the court in Scotland where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the Court of Divorce here. How would the Court of Divorce here deal with the converse case? I can figure many phases in which the question of the efficacy of a decree of divorce may present itself, and I am unwilling, in the present case, to go farther than to say that the cases referred to satisfy me that the law of England does not acknowledge the validity of a decree of divorce obtained in the circumstances disclosed in this case.

There is still another point in the case which has raised some doubt in my mind. It is this: Assuming, as we must do, on the evidence, that, according to the law of Scotland, the marriage of the father and mother of the appellants was a valid marriage, and they are children lawfully procreated of that marriage, and so in their own country legitimate from their birth, is that status to be denied to them in this country, on the ground that is here pleaded? I do not question the logic of the reasoning by which the conclusion has been reached, that if there were no valid divorce there was an incapacity to marry, and, consequently, no valid marriage. But there was a valid divorce, and a capacity to marry in the territory, and when that marriage has resulted in the birth of children, who have the status of legitimate children according to the law of their own country, are we in reference to them and their rights to revert to an inquiry, at whatever distance of time, as to whether Buxton's resort to Scotland was, or was not, for the purpose of facilitating the divorce? That has not been directly decided in any of the cases, — not even in the case of Vardill, — but I think the cases tend in that direction so strongly that I cannot, especially after the opinions now delivered, take upon myself to suggest a doubt as to their being the law of England, although I do not see my

way to reconciling it with general principles of jurisprudence, or the generally recognized rules of international law. . . .

The learned judge in the court below refers to the monstrous consequences that would result from recognizing the possibility of a man having two lawful wives, one in England, and another in some other country. But I think he has failed to perceive that such a state of matters would be promoted rather than restricted by the doctrine of absolute indissolubility, and of the supremacy of the *lex loci contractus*, while it would not exist if effect was given to the foreign decree of divorce.

Order affirmed, and appeal dismissed.

IN RE GROVE.

COURT OF APPEAL. 1888.

[Reported 40 Chancery Division, 216.]

FURTHER CONSIDERATION. This was an action for the administration of the estate of Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October, 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October, 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, *i. e.* the Vaucher family and the Falquet family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the Vaucher family and the Falquet family claimed through the same man, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances:—

Marc Thomegay, who was the grandfather of the intestate, was born in Geneva of Swiss parents, in the year 1712, and there was no question that his domicile of origin was Genevese. On the 13th of August, 1728, he was received as a burgess of Geneva. In 1729, his father, who was a watchmaker, died in Geneva. Marc Thomegay was a worker in gold and silver, and in 1734, being then twenty-two years of age, he came to England, where he remained until his death in 1779. In the year 1743 a private Act of Parliament was passed, whereby Peter Thomegay, the brother of Marc Thomegay, and four other foreigners were naturalized as subjects of Great Britain, but this act did not include and made no mention of Marc Thomegay.

Some time after the arrival of Marc Thomegay in England, he formed a connection with an Englishwoman named Martha Powis; he

cohabited with her, for several years, and had by her three illegitimate children, viz., Sarah, who was born on the 5th of February, 1744, and was baptized on the 24th of the same month by the name of Sarah Thomegay, in the church of St. Mary, Whitechapel, where he presented her under his own name and as his daughter; a son, who was born on the 11th of January, 1745, and was baptized on the 16th of February following, in the same church; and another daughter, who was born on the 14th of November, 1747, and was baptized on the 13th of December following, in the parish church of Barking in Essex. These two children were also baptized under their father's name, and as his children.

Sarah Thomegay, on the 19th of December, 1768, married M. Delom, a citizen of Vevey, and she was the ancestress of the Vaucher family.

Elizabeth Thomegay married a M. Courbel, a citizen of Geneva.

On the 22d of May, 1749, Marc Thomegay was married to an Englishwoman named Elizabeth Woodhouse, in the church of St. Pancras; of this marriage there was issue one child, viz. Margaret Sarah Thomegay, who was born on the 22d of December, 1749, and was baptized on the 13th of January, 1750, in the church of St. Leonard's, Shoreditch. Margaret Sarah Thomegay, on the 13th of June, 1788, married an Englishman named William Grove, and she died in London in the year 1792, having had issue one child only, viz. the intestate Caroline Emilia Grove.

Elizabeth Woodhouse died on the 26th of March, 1752, and on the 2d of February, 1755, Marc Thomegay married Martha Powis, by whom he had formerly had the three illegitimate children above mentioned.

Of this marriage there was issue four children, one of whom died in infancy. The others were Jean, who was born on the 5th of October, 1756, and was baptized on the 29th of the same month in the church of Westham, Essex; Richard, who was born on the 11th of February, 1762, and was baptized on the 1st of March following, in the church of St. Leonard's, Shoreditch; and Sophie Martha, who was born on the 12th of November, 1764, and was baptized on the 7th of December following, in the same church.

Of these three children, Sophie Martha was the only one who left issue, and she in 1791 married Jean Louis Falquet, and was the ancestress of the Falquet family.

Martha Thomegay (*née* Powis) died in the year 1772.

In the year 1774 Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three children by Martha Powis before his marriage with her, in which he stated "that in 1734 he went to England, where he now is, that one of the first ties he formed was an attachment for Miss Martha Powis, whom he intended to marry as soon as fortune would allow him to do so; that thwarted by circumstances and encouraged by their intention to marry one another as soon as those circumstances would permit, they yielded and

lived together for several years as husband and wife; that of this intercourse they had three children." Then after stating the names and dates of the births and baptisms of these children, as above set forth, he stated "that very extraordinary circumstances thwarted the resolution he had formed to marry Martha Powis, and induced him to marry Miss Elizabeth Woodhouse," and stated the death of his wife Elizabeth and his subsequent marriage with Martha Powis. Then the petition stated, *inter alia*, that the petitioner, having been informed that in Geneva, his native country, subsequent marriage legitimized illegitimate-born children, made application in order to prove, by the certificates there mentioned, the births of his son Marc, and his daughters Sarah and Elizabeth, praying the Council to grant him record of his proofs and declarations, so that no one might question to his above-mentioned three children, their condition of legitimate children in Geneva, his native country. An order was made by the Council granting record accordingly, and the births of these three children were entered in the register of births of children of Genevese parents born in foreign parts.

The statements contained in this petition were borne out by the certificates attached thereto, and these certificates were put in evidence in this action.

Marc Thomegay made his will on the 9th of March, 1779, describing himself as of Tottenham, in the county of Middlesex, and died on the 2d of December, 1779. From the will it appeared that he was carrying on business in partnership with his son, and was entitled to a leasehold house, workshops, and premises in Moorfields, within the parish of St. Leonard's, Shoreditch. It did not appear when this lease was granted, but in the baptismal certificates of 1744 and 1745 the parents were described as of Ayliffe Street, and Moorfields was not mentioned in any certificate until the year 1750.

There was evidence that according to the laws of the canton of Geneva illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The Chief Clerk, by his certificate made in this action, in substance left to the court the question whether under these circumstances Sarah Delom and the other two children born of Marc Thomegay and Martha Powis during their cohabitation were to be taken as legitimate or not; and found that if Sarah Delom ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said Sarah Delom, who were represented by the plaintiff, and that if not, such next of kin was the Falquet family.

The further consideration came on for hearing before Mr. Justice STIRLING on the 20th of July, 1887.¹

The plaintiff appealed [from the judgment of STIRLING, J].

¹ The arguments and the decision of Mr. Justice STIRLING are omitted. — Ed.

FRY, L. J.¹ I agree entirely with the conclusion arrived at by the Lord Justice, and I am glad to say that I also agree in the law which he has laid down, but the facts of the case influence my mind somewhat differently, and I pick my way through those facts to the same conclusion by a somewhat different course. I will, therefore, endeavor to state, as briefly as I can, the view I take of this case.

The appellant claims through Sarah Thomegay, who was born in 1744, in this country, and was an illegitimate child of Marc Thomegay and Martha Powis. At birth that child took the domicile of its mother and it took the status of illegitimacy, according to the law of the domicile of its mother, and it took also the capacity to change that status of illegitimacy for one of legitimacy, provided that according to the law of the domicile of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicile and status from the mother, but taking the potentiality of changing its status from the putative father. That I take to be the law applicable to this case, and that gives rise to the first question, what was the domicile of the father in the year 1744?

It must be taken that the domicile of the father was Genevese at the date of the birth of Sarah in 1744. If his domicile were English, there would be an end of the case; if the domicile were Genevese, as I hold, then arises the second question, which is this: What was his domicile at the date of the subsequent marriage of the parents in 1755? It appears to me that the domicile governs the effects of the marriage. That I take to be the general law, and it is so laid down by Mr. Justice Story, in the 189th paragraph of his work on Conflict of Laws: "In a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage." If, therefore, the subsequent marriage was governed by the English domicile it would seem to follow that no legitimation can take effect. If, on the contrary, the subsequent marriage is governed by Genevese domicile, it would seem that subsequent legitimation does take effect. It may be, though on this point no evidence has been adduced, that the Genevese law would recognize an English marriage as legitimating the previously born issue. Whether that be so or not I do not know, but even if it be, my conclusion is, that we should not follow the Genevese law, if it gave a greater effect to a marriage contract in England when the parents have an English domicile, than the English law gave to it; and for this reason, that the State imposes on all persons domiciled in it, its own conclusions as to the effect of marriage. Here again I would refer to the same paragraph in Mr. Justice Story's Conflict of Laws, where, citing the judgment of Lord Robertson, a Scotch judge, he says: "Marriage is a contract *sui generis*; and the rights, duties, and obligations which arise out of it are matters of such importance to

¹ Concurring opinions of COTTON and LOPES, L.JJ., are omitted. They differed from FRY, L. J., in holding that Thomegay was domiciled in England at the birth of Sarah. Part of the opinion of FRY, L. J., is omitted. — ED.

the well-being of the State, that they are regulated not by the private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory." I would remark again, that I entirely agree with what has been said by Lord Justice Cotton, with regard to the effect of the cases of *Munro v. Munro*, 7 Cl. & F. 842, and *Udny v. Udny*, Law Rep. 1 H. L. Sc. 441, on this question of law, and I think that they very strongly support the conclusion which I have endeavored to express.

Now, that being so, we come back to the question of fact, where was Marc Thomegay domiciled in 1755 when he contracted marriage with Martha Powis? In my judgment his domicil was English. . . . and that consequently the English law of marriage must govern the effects of the marriage then contracted, and that English law would not allow subsequent legitimation. I come, therefore, to the same conclusion, though by a somewhat different course, as that of my learned brother.

*Appeal dismissed with costs.*¹

SCOTT v. KEY.

SUPREME COURT OF LOUISIANA. 1856.

[Reported 11 *Louisiana Annual*, 232.]

BUCHANAN, J.² This cause has already been before this court, and was remanded to make proper parties defendant. See 9 La. Ann. 213.

Plaintiffs are the surviving brother and sisters of Samuel Estill, deceased, and the children of a deceased brother of said Samuel. They claim to be heirs at law of Samuel Estill. The defendants are the curator, and the half-brothers and sisters, heirs of one William Estill, who was a natural son of Samuel Estill, but legitimated by a statute of the State (then territory) of Arkansas, of which Samuel and William Estill were at the time residents, passed October 27th, 1835, and entitled "an act to legitimize the son of Samuel Estill." For a copy of the said statute in full, see the report of this case in 9th La. Annual.

The question now presented for our decision is, whether the statute in question had an extraterritorial effect, and enabled William Estill to inherit, as the legitimate son of Samuel Estill, the property left by the latter in Louisiana. The solution of this question appertains to a distinction (which has been recognized by various decisions of the Supreme Court of Louisiana) of statutes real and statutes personal. The leading case on this subject is *Saul v. His Creditors*, 5 Mart. n. s., in which it was decided, that the general law of Virginia, which renders

¹ *Acc. Munro v. Munro*, 1 Robt. H. L. 492; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 91 N. Y. 315; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 17 Atl. 964. — Ed.

² The statement of facts, arguments, and dissenting opinion are omitted. — Ed.

property acquired during marriage the property of the husband, is a real statute, which did not follow a couple, who had contracted marriage in Virginia, into the State of Louisiana, where they resided many years, and where the wife died; but that property acquired in Louisiana after their removal thither, entered into the matrimonial partnership of our law, and on the dissolution of the marriage, belonged one-half to the wife's heirs. And in the case of *Banna v. Alpuente*, 6 Mart. n. s. (the same judge, Porter, who had, in the case of *Saul*, reviewed all the authorities, being the organ of the court), it was decided that the laws of domicile of origin govern the state and condition into whatever country the party removes; in other words, that such laws are personal statutes. And those two decisions are in harmony with the definition by Chief Justice Eustis, of the real and personal statute, in the case of the *Augusta Insurance Company v. Morton*, in 3 La. Ann. 426: "Those laws are real," says the learned judge, "in contradistinction to personal statutes which regulate directly property, without reference to the condition or capacity of its possessor." There are some expressions of Judge Strawbridge, in the case of *Brosnahan v. Turner*, 16 La. 439, which are relied upon by plaintiffs' counsel, and which are scarcely consistent with this definition. But the decision in *Brosnahan v. Turner* turned upon a totally different point, the validity of a sheriff's sale. The remarks in *Brosnahan v. Turner*, as to the incapacity of the testamentary heirs of Villarde to inherit in Louisiana, under a will probated under the authority of a statute of Florida, are at best but *obiter dicta*, and besides refer to a very different state of facts from that presented in this case. Here, an infant, or minor, son of a resident of Arkansas, born out of wedlock, was, by an act of the legislature of the country of his domicile, legitimated, or put upon the same footing as if his parents had been married at the time of his birth.

It is admitted of record, that William Estill, then a small child, October 27, 1835, resided with his natural father, Samuel Estill, in Arkansas, who was then a citizen of Arkansas, and resided in Arkansas, and that both of them resided therein for several years before 1835, and also continued to reside in Arkansas until some time between 1837 and 1841." Arkansas was then the *bona fide* domicile of the Estills, at the time of the passage of the act of the legislature in question. William was, by law, the legitimate son of Samuel in Arkansas. Can it be said that he lost his status by crossing the State line into the frontier parish of Carroll, some years afterwards? We think not. The heritable quality of legitimacy which he had received from the legislature of the State of his residence accompanied him when he changed his domicile.

The error of the judgment appealed from consists in regarding William Estill as illegitimate, at the time of his father's death. But he was not so. The original taint of illegitimacy had been removed by the act of the legislature. Legitimacy and illegitimacy are the result of positive laws, which differ very materially in different countries.

To illustrate this idea, suppose William Estill had been born in Louisiana, and that after his birth his father and mother had got married in Louisiana, and subsequently to their marriage removed with their child to Arkansas. Their marriage after his birth would have legitimated their offspring by the law of their domicile; yet by the law of Arkansas a subsequent marriage would have not produced that effect. Nevertheless, the status of legitimacy being acquired in Louisiana would have accompanied him into Arkansas. There are many precedents, in the legislation of various States of this Union, of legitimation by act of the legislature, and particularly in Louisiana. This seems identical with the legitimation *per rescriptum principis* of the Roman law.

Voet, Commentarius ad Pandectas, lib. 25, tit. 7, §§ 4 and 13.

If it is true that a general law of the place of domicile, changing the status of its citizens according to circumstances, is a personal statute, accompanying the party to every other country, provided the circumstances which operate such change have occurred before the change of domicile, which we consider to be the doctrine settled in Louisiana, *a fortiori*, is a special law, removing a disability from a particular citizen by name, such a statute? The constitutional power of the legislature to enact such exceptional enabling statutes was drawn directly in question, and ruled affirmatively, in the case of *Pritchard v. Citizens Bank*, 8 La. 133. The maxim cited by Story, *Conflict of Laws*, § 51, from Boullenois, "Habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco," must therefore be deemed law in Louisiana.

And is it not correct to say, that the statute of Arkansas, to legitimate William Estill (which is a personal statute), conflicted with the statute of distributions of Louisiana (which is a real statute); and consequently, as was held in Saul's case, is overruled by the latter statute? By the Louisiana statute of distributions, the legitimate son inherits in preference to the brothers and sisters of the deceased. By the effect of the statute of Arkansas, William Estill was the legitimate son of Samuel Estill. Upon the demise of Samuel Estill in Louisiana, in 1849, fourteen years after that statute, William Estill, as his legitimate son, was his heir, by the law of Louisiana.

In confirmation of this view of the subject, we may quote the language of the High Court of Errors and Appeals of Mississippi, in the case of *Smith v. Kelly*, 23 Miss. Rep., 170: "It is a well settled principle, that the status or condition, as to the legitimacy, must be determined by reference to the law of the country where such status or condition had its origin."

Judgment of the District Court reversed; and judgment for defendants, with costs in both cases.

SPOFFORD, J. It was competent for the legislature of Arkansas, the domicile of its origin, to fix the status of William Estill.

In substance and effect, that legislature gave him the *status* of a legitimate son of Samuel Estill.

The Arkansas statute, legitimating William Estill, was a personal statute.

Therefore, the status of a legitimate son of Samuel Estill would accompany William Estill into whatever country he might go.

He came hither with the status. He inherited, by our law, from his father, Samuel Estill, because he was to all intents and purposes a legitimate son, having become so by the law of the domicile of his origin, and not in fraud of our law, nor in violation of its policy.

I, therefore, concur in the opinion and judgment of Mr. Justice BUCHANAN.

MERRICK, C. J., dissenting.

BARNUM v. BARNUM.

COURT OF APPEALS OF MARYLAND. 1875.

[*Reported 42 Maryland, 251.*]

THIS was a bill for the distribution of the property of David Barnum. John R. Barnum claimed a distributive share as grandson of David and son of Richard Barnum. John R. Barnum was born in Arkansas, while his father was domiciled there; the court, however, decided, that his parents were not married, and that he was illegitimate. He having died during the progress of the suit, his representative appealed.¹

ALVEY, J. It is contended that notwithstanding there may have been no marriage between Dr. Barnum and Caroline Butler, yet by the operation of the act of the legislature of Arkansas, before referred to, John R. Barnum was rendered legitimate, as if a valid marriage had taken place, and was therefore capable of taking whatever right that would or could devolve on any legitimate child of his father; that the act was retroactive, and related back to the time of the birth of the child declared to be heir.

In this, however, we do not agree with the counsel of the claimants. As we have seen, the act makes no reference to any marriage, and in no sense could operate to confirm any defective or imperfect marriage. Its operation does not even depend upon the fact that John R. Barnum was the child of Richard Barnum. It simply, by force of the law itself, and not of the circumstances of birth or relationship, gave to John R. Barnum a personal status, with capacity to inherit from Richard Barnum as heir. This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it, in the State of Arkansas. As to such rights they would be respected everywhere. *Sto. Conf. L.*, § § 101, 102. But as to capacity to acquire property beyond the State passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John R. Barnum, without

¹ This short statement is substituted for that of the reporter. Only so much of the opinion as discusses the legitimacy of John R. Barnum is given. — ED.

reference to previous marriage, it could have no operation here, and no rights involved in this case could be affected by it. This would seem to be clear both on reason and authority. 5 Com. Dig. Parliament (K), p. 301; *Birtwhistle v. Vardill*, 5 B. & Cr., 438; *Houlditch v. Marquess of Donegall*, 2 Clark & Finn., 476; *Smith v. Derr's Adm'rs*, 34 Penn. St., 126; Sto. Conf. L., §§ 87, 87 a.

The claim, therefore made in the right of John R. Barnum, must be rejected.¹

ROSS v. ROSS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[Reported 129 *Massachusetts*, 243.]

GRAY, C. J.² This case presents for adjudication the question which it was attempted to raise in *Ross v. Ross*, 123 Mass. 212, namely, whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicile, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicile into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

The question how far a child, adopted according to law in the State of the domicile, can inherit lands in another State, was mentioned by Lord Brougham in *Doe v. Vardill*, 7 Cl. & Fin., 895, 898, and by Chief Justice Lowrie in *Smith v. Derr*, 34 Penn. St. 126, 128, but, so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicile. It is often said, as in *Cutter v. Davenport*, 1 Pick. 81, 86, cited by the tenent, to be a settled principle, that "the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated." But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*. *Goddard v. Sawyer*,

¹ *Acc. Lingen v. Lingen*, 45 Ala. 410. — Ed.

² Part of the opinion only is given. — Ed.

9 Allen, 78; *Sedgwick v. Laffin*, 10 Allen, 430, 433; *United States v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat. 577; *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivant*, 10 Wheat. 192.

It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. *Milliken v. Pratt*, 125 Mass. 374, and authorities cited.¹

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. *Co. Lit.* 7 *b*, 237 *b*; 4 *Phillimore*, § 531; *Mackenzie's Roman Law*, 120-124; *Whart. Conf.* § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. *Fuselier v. Masse*, 4 La. 423; *Vidal v. Commagère*, 13 La. Ann. 516; *Teal v. Sevier*, 26 Tex. 516; *Miss. St.* 1846; *Hutch. Miss. Code*, 501; *Alabama Code of 1852*, § 2011; *N. Y. St.* 1873, *c.* 830;

¹ The court, in omitted portions of the opinion, cited and discussed at length the following cases, among others: *Doe v. Vardill*, 2 Cl. & F. 571; *Shedden v. Patrick*, 5 Paton, 194, 1 Macq. 535; *Strathmore Peerage*, 6 Paton, 645; *Rose v. Ross*, 4 Wils. & Sh. 289; *Don's Estate*, 4 Drewry, 194; *Skottowe v. Young*, L. R. 11 Eq. 474; *Loring v. Thorndike*, 5 All. 257; *Smith v. Kelly*, 23 Miss. 167; *Scott v. Key*, 11 La. Ann. 232; *Barnum v. Barnum*, 42 Md. 251; *Smith v. Derr*, 34 Pa. St. 126; *Harvey v. Ball*, 32 Ind. 98; *Lingen v. Lingen*, 45 Ala. 410; *Com. v. Nancrede*, 32 Pa. St. 389; *Shafer v. Eneu*, 54 Pa. St. 304. — Ed.

N. J. Rev. Sts. of 1877, § 1345; Penn St. 1855, c. 456; Purd. Dig. 61; 1 Southern Law Rev. (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts. . . .

The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them, it permits any inhabitant of the State to petition for leave to adopt a child; it requires the petition to be presented to a court in the county where the petitioner resides; it requires the consent of the parents or surviving parent of the child; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent; and it makes the record of that decree evidence of that fact.

The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age; in omitting the words "as if born in lawful wedlock" in defining the effect of the adoption; in also omitting any exception to the adopted child's capacity of inheriting from the adopting parent; and in expressly providing that, if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent. . . .

The law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster v. Waterman*, 124 Mass. 592; 4 Phillimore, § 531; Whart. Conf. § 251. The status of the demandant, as adopted child of the intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the adopting father, as that which he might have acquired in this Commonwealth had the parties been then domiciled here. In this respect, there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, are not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

The tenant in his argument laid much stress on the words of the statute of descents and of the statutes of adoption of this Commonwealth.

The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person dies intestate, seised of any real estate, it shall descend, subject to his debts, and saving rights of homestead, "in the manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants," etc. "Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters," etc. "Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth." Gen. Sts. c. 91, § 1. See also St. 1876, c. 220.

But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words "children" and "child," for instance, in the first clause, "issue," in the phrase "if he leaves no issue," in subsequent clauses, and "kindred," in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under § 4 of the same chapter, or a child adopted under the provisions of c. 110 of the General Statutes, or c. 810 of the Statutes of 1871.

These statutes, after providing how a child may be adopted in this Commonwealth with the sanction of a decree of the Probate Court in the county in which the adopting parent resides (or, under the St. of 1871, in the county where the child resides if the adopting parent is not an inhabitant of this Commonwealth), enact that a child "so adopted" shall be deemed, for the purpose of inheritance, and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption. St. 1851, c. 324, § 6; Gen. Sts. c. 110, § 7; St. 1871, c. 810, § 8. It is argued that the words "so adopted" imply that children otherwise adopted are incapable of inheriting lands in this Commonwealth. But it appears to us that these words, in the connection in which they stand, warrant no such implication; and that the legislature, throughout these statutes, had solely in view adoption by or of inhabitants of this Commonwealth, and did not intend either to regulate the manner, or to define the effects, of adoption by and of inhabitants of other States according to the law of their domicil.

We are not aware of any case, in England or America, in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into this Commonwealth, and that by virtue thereof the demandant is entitled to maintain this action.

It is worthy of mention (although it cannot of course affect the rights of inheritance which had absolutely vested on the death of the intestate; *Tirrel v. Bacon*, 3 Fed. Rep. 62) that by a recent statute of this Commonwealth "any inhabitant of any other State, adopted as a child in accordance with the laws thereof, shall, upon proof of such fact, be entitled in this Commonwealth to the same rights, as regards succession to property, as he would have enjoyed in the State where such act of adoption was executed, except in so far as they conflict with the provisions of this act." St. 1876, c. 213, § 11.

*Judgment for the demandant.*¹

BLYTHE v. AYRES.

SUPREME COURT OF CALIFORNIA. 1892.

[*Reported 96 California, 532.*]

GAROUTTE, J.² This is an action instituted under section 1664 of the Code of Civil Procedure by the plaintiff, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. . . . Plaintiff's claim is based upon sections 230 and 1387, respectively, of the Civil Code of California. Section 230 reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387, as far as it pertains to the matters involved in this litigation, provides: "Every illegitimate child is an heir of the

¹ *Acc. Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467. And see *Estate of Sunderland*, 60 Ia. 732, 13 N. W. 655. — Ed.

² Part of the opinion is omitted. — Ed.

person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." . . .

The facts found by the court which face us while we are engaged in a consideration of the first branch of this subject may be succinctly and substantially stated as follows: (1) That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry; (2) that Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe; (3) that plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the 29th day of August, 1873; (4) that said Blythe was a citizen of the United States and of the State of California, domiciled in said State, and died intestate therein April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except said Florence Blythe, the plaintiff herein; (5) that said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married.

Before passing to the merits of the discussion, we pause a moment to say that the verb "adopts," as used in section 230, is used in the sense of "legitimizes," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. (See law dictionaries, — Bouvier's, Black's, Anderson's, and Rapalje's.) This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint.

The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the State, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Taney, C. J., in *Brewer v. Blougher*, 14 Pet. 178, when considering a quite similar provision of a statute: "In the case before us the words are general, and include all persons who come within the description of illegitimate children; . . . and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class." Bar, in his work on International Law (page 434), says: "Legitimation of bastards, either by subsequent marriage or by an act of the government (*rescriptum principis*), is nothing but a legal equalization of certain children illegitimately begotten with

legitimate children." In other words, the object and effect of section 230 is to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock. . . .

The contention of appellants that the status of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our State legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions a State law must be held, by its own courts at least, to have extraterritorial operation; and this principle of the foreign operation of State laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of State laws is fully exemplified in the case of *Hoyt v. Thompson*, 5 N. Y. 340. . . .

Section 215 of the Civil Code is as follows: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." This section takes a wide range. Its operation is not confined within State lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions; it is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England, and married Julia Perry, such marriage, under the provision of law just quoted, *ipso facto* would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this State attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its status. Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption of Blythe's marriage to Julia Perry, in its facts, forms an exact photograph of the celebrated case of *Munro v. Munro*, found in 1 Rob. App. 492; a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. . . .

Appellants insist that the domicile of the child irrevocably fixes that child's status. In this case, subsequent to the child's birth, Julia Perry

married a domiciled Englishman; hence her domicile was permanently established in England, and for that reason the child's domicile, being the mother's domicile, was permanently established there. Under appellants' reasoning this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicile. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other States, is bad law, for it is squarely in conflict with those views. . . .

We have quoted thus extensively from the authorities upon the subject of domicile as specially bearing upon the question of *legitimation per subsequens matrimonium* for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. The only distinction claimed by appellants is that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. . . .

Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this State authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. . . .

Plaintiff was the child of Blythe, who was a domiciled citizen of the State of California. She founds her claim upon the statutes of this State, and is now here invoking the jurisdiction of the courts of this State. It is a question of California law, to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe, being domiciled in the State of California both at the time of the birth of plaintiff and at the time he performed the acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doing of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation under section 230 of the Civil Code of this State.¹

¹ Upon an examination of the evidence, the learned judge decided that Blythe had done all things required by § 230 to legitimate his daughter. PATERSON and SHARPSTEIN, JJ., concurred. McFARLAND and DE HAVEN, JJ., held that the acts required for legitimation under § 230 had not taken place, but concurred in the result on the ground that plaintiff was heir under § 1387. BEATTY, C. J., and HARRISON, J., did not sit. — ED.

EDDIE v. EDDIE.

SUPREME COURT OF NORTH DAKOTA. 1899.

[Reported 79 Northwestern Reporter, 856.]

YOUNG, J.¹ This is a contest between the two sets of children of one Henrick Nickolai Eddie, deceased, to determine the right of succession to his estate. Eddie, the decedent, died in Grand Forks County October 9, 1896, without will, and possessed of considerable property, both personal and real, situated in that county. Henrick Ferdinand Eddie and Axel Eddie, who are plaintiffs herein, are the natural children of decedent. The defendants are his children by marriage, and are legitimate. The entire contest is as to the right of these natural children to share in the estate of their father by inheritance, under the laws of this State. . . .

The undisputed facts which are pertinent to the issues are these: Henrick Nickolai Eddie, the decedent, was born in the kingdom of Norway in 1843, near Levanger, where he resided continuously until 1869, when he came to the United States, where he lived thereafter and up to the time of his death. Prior to coming to this country, he cohabitated with one Sarah Rinnan, who also lived at Levanger. The plaintiffs are the issue of this intercourse: Henrick Ferdinand Eddie, born in 1861, and Axel Eddie, born in 1865. Both of these children lived with their mother up to the time of her death, which occurred about twenty years ago, and have always resided in Norway. There is no claim that their parents were ever married. After coming to this country, and in 1871, at La Crosse, Wis., Henrick Nickolai Eddie, the decedent, married Olcaana Gorden. The defendants are the issue of that marriage. After leaving Norway, in 1869, decedent never saw or communicated with the plaintiffs or their mother in any way. Neither did he ever acknowledge these children as his own by written instrument. The plaintiffs base their right to inherit upon a claim that they were adopted by their father, and thereby became legitimated, and, as a result, became his heirs under the laws of this State. The material facts upon which the claim of adoption rests are found in the seventh finding of fact of the district court, which is as follows: "That during all the time after the birth of each of said plaintiffs, and up to the date of the immigration of said Henrick Nickolai Eddie to the United States of America, said Henrick Nickolai Eddie treated each of these plaintiffs as if he were a legitimate child of him, said Henrick Nickolai Eddie; that during said time he furnished support and maintenance to each of said children and to their said mother; that during said time he corrected and reprovved said children; that during said time he lived a portion of the time with the said children and their said

¹ Part of the opinion is omitted. — ED.

mother at Levanger, aforesaid; that during all of said time the said Henrick Nickolai Eddie publicly acknowledged each of said children, Henrick Ferdinand and Axel Eddie, as his own." The district court, in its conclusions of law, found that plaintiffs were adopted by decedent as his own children, by his acts, prior to 1869, and that they were his heirs at law, and as such entitled to participate in the distribution of his estate. It will be noticed that all of the acts of the decedent which it is contended amount to an adoption of plaintiffs occurred in Norway, when he and plaintiffs and their mother were all residents of that kingdom. There is nothing in the record to show what the law of Norway is, or that there is any legal authority in that country for the legitimating or adoption of bastard children. Neither is it at all material, for appellants do not claim to have been legitimated and given the capacity to inherit by the laws of their own country, but rest their alleged status of legitimated children and claim to inheritable blood solely upon the laws of this State, where their father resided at his death, and where the estate is situated. It is contended that the acts of recognition by their father which occurred in Norway prior to the year 1869, which are set out in the finding of fact before quoted, legitimized and made them heirs under section 2806, Rev. Codes, which reads as follows: "The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it was a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." The district court reached the conclusion that there had been an adoption, and consequent legitimation, under this statute. Accepting the facts found by that court as true, we are yet not able to reach the same result. It is agreed that the laws of this State regulating the descent and distribution of property govern this estate. This follows necessarily from an application of the rule that personal property descends according to the law of domicile of the owner, and real estate under the law of the place where situated, for in this case both the real and personal property, as well as the domicile of the owner, were within this State. Comity between States has not gone to the extent of recognizing the right of one State to designate the persons to whom realty situate in another State shall descend, and doubtless never will. Another principle which is as universally recognized is that the laws of each State fix the status of the persons domiciled therein. This was expressed in *Ross v. Ross*, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every State so far as they are not inconsistent with its own laws and policy." We

may also say that the domicile of an illegitimate child is that of its mother until it acquires one for itself, and that these claimants were, therefore, at all times domiciled in the kingdom of Norway. It is apparent that the rights of claimants are determined by the construction to be given to section 2806, Rev. Codes, upon which they rely. Is it a statute of descent or a statute fixing status? If it is a statute of descent, merely descriptive of a class of illegitimates who are thereby authorized to inherit property situated in this jurisdiction, the fact that claimants were domiciled beyond the confines of the State, and in a foreign land, will deprive them of no rights which the State may have given to them in the estate of the intestate. But, on the other hand, if it is construed as a statute of adoption, creating for those domiciled within the State a status of legitimacy between the illegitimate and its father, in all things like the adoption of another child save in the procedure, and followed by the same legal consequences, both to parent and child, then there can be no pretence that the acts which were all done without the jurisdiction, and in a foreign State, would be a compliance with the section quoted so as to constitute an adoption as so construed; for neither father, mother, children, nor property were in the State or territory when the acts of adoption are said to have occurred. Their own land attached to their status the stigma of illegitimacy. While so domiciled, it was not within the power of another State to remove it. But this absence of power to make or alter the status of the subjects of another State implies no restriction upon the right of the State to control the descent of real estate within its limits, and to lend the aid of its laws to convey their respective interests therein to such classes of persons as it may have designated as heirs, regardless of where they may be domiciled, or the status which they may have. Chapter 8 of the Civil Code, in which the section of the statute is found through which the plaintiffs claim a right to inherit, is composed of ten sections. The first seven sections provide for the adoption, by any adult person, of minor children other than his or her own, by a decree of the district court of the county of the residence of the adopting parent. The eighth fixes the status of the child so adopted as that of one born in lawful wedlock. The following section provides that the decree shall deprive its natural parents of all legal rights respecting it, and frees the adopted child from the obligations of obedience and maintenance to its natural parents. The chapter is concluded by the section in question, which is as strictly a statute of adoption as those preceding. By the former, one may adopt only the child of another, and then, by a decree of court, entered in the public records. By the latter the father is permitted to adopt his own child, not by public proceedings, and by written document containing and perpetuating the record of his child's disgrace, and his own shame, but by voluntarily assuming the usual relation and duties of a father; or, as expressed in the statute, "publicly acknowledging it as his own, receiving it as such with the consent of his wife,

if he is married, into his family, and otherwise treating it as if it were a legitimate child." The adoption in fact is made an adoption in law, and the statute serves the same purpose as the decree, "and such child is thereupon deemed for all purposes legitimate from the time of its birth." In short, all of the mutual rights and duties of parent and child are called into being, placing upon the father the legal obligation of care, education, and support, and giving to him the custody of the child, as well as a right to its earnings; while the child so adopted becomes bound to perform all of the duties of a legitimate child. The status thus created is that of a child adopted by regular procedure of court. Section 2802 of this chapter by its language expressly limits the right of adoption by application to the district court to inhabitants of the State. While it is true, the father of an illegitimate child is not required to pursue the same steps to legally adopt his own child, yet, in view of the fact that the same status is created, and the same mutual and legal obligations between the adopting parent and his child result, the conclusion is irresistible that this section also only applies to parents who are domiciled within the State at the time the adoption in fact occurs. This view is in accord with the holding of the Supreme Court of California, where this same statute has been in force since 1873. See *Blythe v. Ayres*, 96 Cal. 532. One of the legal consequences resulting from the status so created is the right to inherit, but this right does not arise from the mere act of adoption, but is elsewhere expressly given to one who has been so adopted. . . . In this case both the petitioners and their father were domiciled in Norway when the acts of adoption are said to have occurred. Such acts did not, therefore, affect their status in this State. The petitioners were not adopted under the laws of this State, and are therefore not entitled to inherit under section 3744, Rev. Codes. The judgment of the district court is therefore reversed. All concur.

SKOTTOWE v. FERRAND.

COURT OF CASSATION, FRANCE. 1857.

[*Reported Journal du Palais*, 1858, 106.]

THE COURT. The judgment from which appeal was taken recited that Thomas Skottove [Skottowe] was born an Englishman, was never naturalized in France, and has always preserved his quality as Englishman; but it also recited that said Skottove lived in France for a great number of years, married there twice successively, and had there his domicile after his second marriage with Sylvine Morland, a Frenchwoman, which was celebrated at la Ferté St. Aubin, October 26, 1853. After this marriage he recognized two natural children he had by her, in France, in 1851 and 1852.

English legislation and decisions (supposing them opposed to the legitimation of natural children by the subsequent marriage of the parents) in case of a marriage celebrated in France, when the father alone is English, domiciled in France, the mother French and the children born in France, could not deprive this woman of the right (which she derived from the French law, the law of the matrimonial domicile to which the intending spouses are supposed to have wished to submit themselves) to legitimate her children by her marriage with their father, or deprive the children of the benefit of this legitimation.

This tacit agreement of the future spouses at the time when they were to be united in marriage should produce, in France, complete and indivisible effects as well concerning the father as concerning the mother and children; otherwise it would not be a true legitimation. The good faith of the mother would be defrauded, as well as the hopes which, in consenting to the marriage, she had reposed in her country's laws, for herself as well as for her children; who, born in France, may, in spite of the recognition by their father in the marriage contract, claim at their majority the quality of French citizens, according to Article 9 of the Code Napoléon.

These considerations of fact and law have all the greater force and power because, — according to its object and its results, which are to repair a fault committed against social order, for the benefit of the natural child who was the innocent victim of it, to create for this child a family that he did not have before, and to raise him to the class and give him the rights of legitimate child, — legitimation by subsequent marriage of the parents, like marriage itself, is in France a question of public order.

It follows that in deciding that Skottowe has not conferred upon his two natural children, born in France in 1851 and 1852, by his subsequent marriage with their mother celebrated in France October 26, 1853, the benefit of legitimation, and that accordingly the gift *inter vivos* made by him to Mrs. Farrand, July 4, 1836, was not revoked and should be executed, the judgment from which appeal was taken expressly violates Articles 331 and 960 of the Code Napoléon.

*Judgment set aside.*¹

¹ *Acc. Joly v. Perkins* (Rouen, 1887), 14 *Clunet*, 183. See *Skottowe v. Young*, L. R. 11 Eq. 474. — ED.

ANONYMOUS.

COURT OF APPEAL, ATHENS. 1893.

[*Reported 21 Clunet, 592.*]

THE COURT. The recognition of a natural child by a Greek in foreign parts is not governed by the laws of the country where the recognition takes place, but by the law of the father's country. The application of the French law, made in the court below according to Article 4 of the Greek Civil Code because the mother was French, is not in conformity with law; for in the recognition it is the father who contracts the relation from which are deduced all the rights of the recognized child. The validity of the recognition made by a Greek in a foreign country should be judged in the same way as if the act had been done in Greece; in short, according to the Greek Civil Code, Article 4: "Marriage and the relations between parents and children are ruled for a Greek residing in a foreign country by the Hellenic law." This solution is also in conformity with the general rule that paternity and filiation are governed by the statute personal (or by the principle of nationality) of the father; this rule is accepted by all nations in the world. The principles we have laid down are professed by very eminent authors (Foelix, *Droit intern.* I. p. 79; Pasquale Fiore, *Droit international privé*, p. 239; von Bar, *Internationales Privatrecht*, II. p. 183).

If recognition were not an institution existing in Greece, a Greek could not make a recognition even in a foreign country, since, according to Article 8 of the Greek Civil Code, the Greek courts cannot take account of institutions which are not admitted by Greek law. According to this solution are the English decisions, which provide that an Englishman cannot recognize a natural child even in a foreign country, whilst a foreigner may recognize a natural child in England provided he can do it by the law of his country. Recognition is not met with in the Roman law, but it is admitted in principle by the modern Greek law (Greek Civil Code, Art. 65). The proof of foreign laws, when they are denied, is obligatory upon the court; consequently the court of first instance, in deciding that it might order the proof of foreign law, if it deemed it necessary, but that it was not bound to do so, falsely interpreted the law of procedure.

The recognized child is French, since before the recognition she married a Frenchman; the French nationality thus acquired cannot be lost by effect of the recognition which without the marriage would have made the child Greek.

The recognition of the plaintiff is to be regarded legal if the act of recognition which she alleges was done in conformity with the French law at Toulon. It is true that the validity of the recognition and the capacity of the father are judged by the Hellenic law; but the external

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forms of recognition are governed by the law of the country where the recognition takes place (Greek Civil Code, Art. 60, where is found the special rule that acts of civil status recorded in a foreign country by competent magistrates according to the forms in use in that country may be effectually proved).

For the rights of inheritance of the recognized child it is necessary to turn to the law which regulates intestate succession to a Greek citizen; now according to Article 5 of the Greek Civil Code, testamentary or intestate succession is regulated by the law of the nation of the deceased, and consequently we must apply Greek law as well for the capacity of the heir as for the extent of his right. The Hellenic law does not regulate the rights of a recognized child to his father's property; one cannot apply the provisions as to legitimated children, because legitimation has for its purpose to make a legitimate child of a natural child, while recognition simply constitutes a *vinculum juris* between father and child. Besides, if recognition gave the recognized child all the rights of a legitimate child, the provisions for legitimation would be superfluous. All modern legislation governing the rights of recognized children has given them not the same rights of succession as those of legitimate or legitimated children, but narrower ones. For this reason the rights of succession of recognized children should be regulated according to the dispositions of the Roman and Byzantine law relative to *liberi naturales (ex concubina*, in the strict sense of the word). According to the Novels, 18 cap. V. and 89 cap. XII., infants born of a concubine succeed in default of legitimate children, either with their mother or alone to the sixth part of their father's goods. These provisions have not been in force since Leo, Emperor of Byzantium, abrogated concubinage as a legal union; but though the provisions are abrogated for children born of a concubine, they remain in full force for recognized children, since the modern legislator in 1856 had the intention (which was not, to be sure, expressly formulated in the law) of applying the provisions to natural children.¹

¹ Acc. 16 Clunet, 676 (Marseilles, 26 Jan. '89). — Ed.

CHAPTER VII.

RIGHTS OF PROPERTY.

SECTION I.

THE NATURE OF PROPERTY.

DUNCAN v. LAWSON.

CHANCERY DIVISION. 1889.

[Reported 41 Chancery Division, 394.]

KAY, J.¹ The opinion of the court is required by the Court of Session in Scotland, which has approved and remitted to this court a case under the Act 22 & 23 Vict. c. 63. Upon several of the matters submitted no doubt can be entertained. One question of considerable interest has been argued.

The question arises under a Scotch will — more properly a trust disposition and settlement — of David Gavin Hewit. He was a domiciled Scotchman, and possessed freehold and leasehold estate in England. He gave all his real and personal property to trustees, with power to convert, and directed them to pay certain pecuniary legacies to charities in England and Scotland. And he disposed of the ultimate residue of his trust estate, on failure of his issue, among certain specified charities.

The validity of these gifts, so far as they are payable out of the proceeds of English freehold or leasehold property, must depend on the *lex loci rei sitæ*, which in England renders charitable gifts by will of real or leasehold property void. The contest arises upon the question who are to take the English property which would have gone to satisfy these bequests. The pecuniary legacies in an English will so framed would, so far as they failed, fall into and increase the residue. The gifts of residue, so far as they failed, would be undisposed of and devolve as upon an intestacy. This, as all the residue is divided among charities, would not alter the quantity of property undisposed of.

There is no doubt as to the devolution of the English freeholds so far as undisposed of by the will. These, or the proceeds of any converted under the will, would descend as real estate, and would belong

¹ The opinion only is given. — Ed.

to the testator's heir-at-law at the time of his death, assuming that the testator had acquired them as a purchaser and not by inheritance. See 3 & 4 Will. IV. c. 106.

The question which has been argued is whether the next of kin of the testator according to English or Scotch law are entitled to the undisposed of leaseholds or the proceeds thereof. *Mobilia sequuntur personam*; and the law of the domicile undoubtedly regulates succession to movable property; but the reason for this is that movables have no locality in law. It is argued that the leaseholds undisposed of, although *immobilia*, belong to the executor, who would be bound to deal with the beneficial interest in them as with other undisposed of personal estate, treating them as personal property by the *lex loci*, and therefore dealing with the beneficial interest in *mobilia* and these *immobilia* in the same way; and that accordingly the beneficial interest must devolve according to the law of the domicile. But the *lex loci* governs the devolution of *immobilia* in case of intestacy, just as it does of freehold property. There is no possibility of doubt that, if the Scotch heir and the English heir were different persons, the English heir and not the Scotch heir would take the undisposed of freeholds in England. The executor is merely the hand to effect the distribution of personal estate. As to the persons entitled under the distribution to succeed to the undisposed of leaseholds, the *lex loci* must govern, or it would practically have no effect at all. The matter is more clear if you take the case of an absolute intestacy, where no executor has been appointed. As to English leaseholds, the Probate Court in England would in that case be called on to appoint an administrator. No doubt such administrator would be chosen from the next of kin according to English law, and it would be his duty, subject to the satisfaction of the testator's debts, probate duty, and the like, to distribute the leaseholds among the persons entitled. At this stage of the proceeding the *lex loci* must determine, independently of the testator's domicile, to whom such distribution must be made.

Such authority as there is upon the subject is in favor of this view. In *Freke v. Lord Carbery*, Law Rep. 16 Eq. 461, 466, where an Irish testator bequeathed, amongst other property, a leasehold house in London upon trust to accumulate the rents, Lord Selborne held that the Thellusson Act applied, although it is not operative in Ireland.¹ In answer to the argument that, according to the *lex loci*, leaseholds in London are personal estate, and therefore come within the rule *mobilia sequuntur personam*, Lord Selborne said: "When '*mobilia*' are in places other than that of the person to whom they belong, their accidental situs is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immovable and not movable. The doctrine is inapplicable to it."

¹ *Contra*, *Despard v. Churchill*, 53 N. Y. 192. — Ed.

In the Goods of Gentili, I. R. 9 Eq. 541, a married woman domiciled in Italy died there possessed of leaseholds in Ireland. Her husband, who survived her, was only entitled by Italian law to a limited interest in these leaseholds, but by the law of Ireland, the *lex loci*, he was entitled absolutely. It was held that the grant of administration should be unqualified. In the very lucid and able judgment in that case, Freke v. Lord Carbery is referred to as a distinct authority "that the succession to chattels real depended on the *lex loci*," which the learned judge states to be his own opinion also.

His Lordship then answered in detail the several questions propounded for the opinion of the court, and expressed the opinion that the persons entitled to take the sums which would have gone to satisfy the charitable bequests, so far as they were payable out of English freehold and leasehold estates, if such bequests had not been invalid, were, as to the leasehold property or the proceeds thereof, the persons entitled to the testator's personal estate according to the English Statute of Distributions.¹

MCCOLLUM v. SMITH.

SUPREME COURT OF TENNESSEE. 1838.

[Reported Meigs, 342.]

GREEN, J.² The complainants, Zilla and Sally, are the children of the defendant, by his former wife Tamsey. Tamsey was the daughter of John Dodd, of Louisiana, who died in that State, possessed of considerable estate, about the first of December, 1815. Mrs. Smith and her husband, the defendant, lived in Tennessee, where she died in February, 1816, before any measures were taken to obtain her share of her father's estate. Her only children surviving her were the complainant, Zilla, wife of McCollum, and Sally, wife of Reid, and William Salsbury, a son by a former husband. William Salsbury died in November, 1826, without lawful issue, leaving his sisters, Zilla and Sally, his only heirs and distributees. The defendant, Smith, obtained his wife's portion of her father's estate in Louisiana, and was guardian of William Salsbury, whose estate went into his hands. This bill is brought by his daughters and their husbands for an account of each of these funds. The principal question in this cause is, whether negroes are to be regarded in Louisiana as real estate or personal. For it is not disputed on either side, but that if personal, the law of Mrs. Smith's domicile will govern; and if real, the law of the place where it was situated will control the succession. Story, Conf. L., §§ 481, 483.

By the law of Louisiana, real estate and immovable things are con-

¹ Acc. Monteith v. Monteith, 9 Sess. Cas. (4th Series) 982. — Ed.

² Part of the opinion only is given. — Ed.

vertible terms. Dig. 1808, b. 2, c. 2, art. 13. And that law, art. 19, contains the following provision in relation to slaves: "Slaves in this territory are considered immovable by the operation of law, on account of their value and utility for the cultivation of the lands, and therefore they may be mortgaged." The chapter from which this extract is made treats only of immovable things, enumerating what are such and in what sense; whether by their nature, or by operation, or destination of law; and commences with the words, "Real estate or immovable things are," etc., thereby substituting the terms, "immovable things," for "real estate." Story's Conf. L., § 447, says, "That in addition to those things which may be deemed universally to partake of the nature of immovables, or, as the common law phrase is, to savor of the realty, all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner governed by the local law. For every nation, having authority to prescribe rules for the disposition and arrangement of all property within its own territory, may impress upon it any character which it shall choose, and no other nation can impugn or vary that character." If these principles be correct, they settle the question; for Louisiana has said, by its law, that slaves are immovable, and having a right to impress upon them any character it may choose, which Tennessee has no right to impugn or vary, it follows that the law of Louisiana must govern the succession.

It is earnestly argued that this language of Judge Story must be restricted in its meaning to such things, movable in their nature, as are by law attached to the land, and are thus made to savor of the realty. This is plainly a misconstruction of the author; for he says, expressly, that in addition to the things that are universally considered to savor of the realty, "all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner governed by the local law;" thus plainly intending to assert the power of a nation to impress any description of property with the character of "immovable," whether connected with land or not.

But it is insisted that no State has a right to do this: and thus give to property, movable in its nature, a destination different from that which by the law of nations would be given to it were there no such local law. If this argument be well founded, the power by law to attach movable property to the freehold, and thus constitute a part of it, would be equally beyond the competency of a State. Is it not as easy to declare, in an act of assembly, that horses for the plow shall constitute part of the freehold, and thus make them immovable, as to announce simply that horses shall be immovable property? It is certainly difficult to perceive upon what principle the competency to enact the former provision can be maintained, while the power to make the latter is denied. And yet the power to attach, by law, things in their nature movable to the freehold, and thus make them immovable, is not denied in the argument; and, indeed, could not be, for the common law, as well as the civil law, recognizes some things movable in their nature

as part of the freehold. This right to impress upon movable things the character of immovables does not depend upon their relation to the freehold, but results from the power inherent in every nation "to prescribe rules for the disposition and arrangement of all property within its own territory." When this shall be done the law applicable to immovables governs the disposition which must be made of such property.

It is insisted that the law of Louisiana referred to was not made with a view to the succession, but that, as only immovables are there subject to mortgage, slaves, on account of their value, were impressed with the character of immovable with the view only of making it lawful to mortgage them. This is evidently a misconstruction of the law. It is true that, after announcing that slaves are immovable property, it is added in the digest of 1808, "and therefore they may be mortgaged." But this is stated as a mere consequence, or incident, resulting from the character with which the property had been impressed by law. The chapter is not treating of mortgage or securities, but of the character of property, defining what things are immovable in contradistinction to movable things. To put it beyond doubt that such is the true construction of this article, it will be perceived by reference to the Civil Code of Louisiana of 1825, b. 2, tit. 1, c. 2, art. 461, that the words "and therefore they may be mortgaged," are omitted altogether. The language of that article is: "Slaves, though movable by their nature, are considered as immovables by operation of law." Thus we have a legislative construction of the article in question, removing all doubt.

These principles having been established, let us apply them to the case under consideration. We have seen that John Dodd died in Louisiana in 1815. His daughter, Tamsey, wife of the defendant Smith, him surviving, then resided in Tennessee, where she died in 1816. In relation to immovable property, the descent and heirship is exclusively governed by the law of the country within which it is actually situate. "No person can take except those who are recognized as legitimate heirs by the laws of that country; and they take in the proportions and order which these laws prescribe." "This," says Judge Story, "is the indisputable doctrine of the common law." Conf. L., § 483. By the law of Louisiana, Dig. Civ. Code, b. 3, tit. 1, c. 2, § 2, art. 27, p. 150, when a man dies all his legitimate children "participate to his succession by equal shares."

John Dodd had five children, of whom Mrs. Smith was one, so that she became entitled to one fifth of all her father's estate. This vested in her as paraphernal property; and as the law of Louisiana governs, as to the land and negroes, being immovables, that portion of the estate was held by her independently of her husband, of which she had the administration and enjoyment. Civil Code La. 334. This property remained undisposed of and undivided, until after the death of Mrs. Smith in 1816. Upon her death, by the law of Louisiana, the succession to all her property in that State is participated by her children. But as that law governs only as to the immovable, Story, Conf. L.,

§ 483, the defendant, her husband, as administrator of her estate in Tennessee, is entitled to her movable effects; and is not bound to account for them to her children. Story, Conf. L., § 481.¹

MESSIMY v. THE REGISTRY.

COURT OF CASSATION, FRANCE. 1887.

[*Reported Pandectes Françaises*, 1887 (6th Part), 12.]

By the terms of a deed executed before Maître Bagiensky, notary at St. Petersburg, on October 10, 1881, certain Russians after making the declarations required by the appendix to Article 7 for the government of mines with a view of obtaining the concession of certain petroleum-bearing lands in the Province of Bakou, formed under the name of "The Naphtha Company of the Caucasus," a company to take the possession, usufruct, and disposition of the lands conceded, for the purpose of developing petroleum wells, selling the products, and acquiring the usufruct or the title, by purchase, lease, or governmental concession, of other petroleum-bearing lands.

By a procès-verbal of November 29, 1881, at Lyons, recorded with the records of Maître Messimy, notary, on December 10 following, an anonymous joint-stock association, under the title of "Company for the Production of Naphtha and Petroleum in the Caucasus," was formed. This company by votes of November 6, 1881, recorded with Maître Messimy, received as assets, 1st, from the Naphtha Company of the Caucasus, the concession of petroleum-bearing lands in the Province of Bakou, the property of that company; 2d, from one Himof, the exclusive right to develop for thirty years certain petroleum-bearing lands near Bog-Boga.

In consideration of these conveyances, the Company for the Production of Naphtha and Petroleum in the Caucasus assigned to the Naphtha Company of the Caucasus 6311 shares, fully paid, of 500 francs each, and paid 3,155,500 francs in cash. For the same consideration Himof received 689 shares and 344,500 francs in cash.

After the registration of the articles of association of the French company there was imposed, in addition to the duty levied on the twenty-five million capital of the company, a duty of two per cent, as on a transfer of movables, on the total amount of 3,500,000 francs paid to the Naphtha Company of the Caucasus and to Himof, representing their conveyances.² . . . Maître Messimy contests the legality of this assessment, on the ground, 1st, that the money value of the conveyances from the Naphtha Company of the Caucasus is not subject to

¹ *Acc. Ex parte Rucker*, 3 Dea. & Ch. 704. But see *Williamson v. Smart*, C. & N. 146. — Ed.

² Only so much of the case as deals with this duty is given. — Ed.

the duty due on sale of movables (two per cent), but to the duty of one-tenth of one per cent, the thing conveyed being an immovable. . . .

The Tribunal of Lyons gave the following judgment: "The question is, to determine the nature of the duty, and for that purpose, the movable or immovable nature of the thing conveyed. The provisions by which the legislature indicates what goods should be regarded as movables and what as immovables are real laws. French real laws govern exclusively things situated in French territory, whoever be the owners, and have no application to things situated outside the territory. This principle shows that when Article 4 of the law of August 23, 1871, designates foreign movable securities as submitted to a tax, it designates not movable securities situated abroad and considered movables in France, but foreign securities which are movables according to the statute which governs them. If the transfer by onerous title, by the concessionary of a mine, of all his rights in the concession is the transfer of a right to immovables, when the mine is situated in French territory, it is a result of the juridical nature given to mines by Article 8 of the law of April 21, 1810, which is a real statute, without application outside the territory. The conveyance made by the Naphtha Company of the Caucasus to the Company for the Production consists of the concession of petroleum-bearing lands situated in the Russian Empire, a concession obtained from the Russian government on the basis of declarations made by representatives of the Company, in conformity with Article 7 of the Regulations for Mines; the movable or immovable character is therefore determined by the Russian law and not by the French. The concession of petroleum-bearing lands of the Caucasus is governed by the Russian law of February 1, 1872, so far as the determination of the rights of the concessionaries is concerned. By the terms of Articles 7, 20, and 21 of this law the petroleum-bearing lands are conceded for the development of the wells, and the concessionaries acquire the right of using while the State retains ownership in the lands. This right is a movable right, and creates a movable security for the benefit of the concessionary. The foregoing applies also to the conveyance of Himof, all the more that the conveyance expressly consists only of the exclusive right to develop for thirty years certain petroleum-bearing land. Article 4 of the law of August 23, 1871, § 2, subjects to the proportional duty transfers, whether gratuitous or for value, when they take effect in France, of foreign public funds, shares, obligations, interests in partnerships, credits, and generally of all foreign securities of whatsoever nature. The law makes no distinction between corporeal and incorporeal movables; it is not confined to movables possessed by foreigners domiciled in France, whether with or without authorization." . . .

An appeal was taken from this judgment to the court of Cassation by Maitre Messimy. . . .

THE COURT. . . . Immovables are governed by the law of the country in which they are situated. The question of knowing whether cer-

tain property is movable or immovable can be determined only by the law of the country where it is found. This principle is applicable not only in civil but also in fiscal matters. Therefore, in considering as movables, by application of the Russian law, of concessions in mines situated in Russia, the judgment appealed from made a just application of the statute real, and violated none of the provisions of law invoked by the appellant. *Appeal dismissed.*

SECTION II.

IMMOVABLES.

CLARK v. GRAHAM.

SUPREME COURT OF THE UNITED STATES. 1821.

[*Reported 6 Wheaton, 577.*]

TODD, J. This is an action of ejectment brought in the Circuit Court for the District of Ohio. At the trial, the plaintiff proved a title sufficient in law, *prima facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September, 1805, authorizing Nathaniel Massie to sell all his estate, etc., in all his lands in Ohio. This power was executed in the presence of two witnesses in Richmond, in Virginia, and was there acknowledged by Graham before a notary public.

Nathaniel Massie, by a deed dated the 7th day of June, 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground that they were not sufficient to convey lands according to the laws of Ohio. The defendants also offered in evidence a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March, 1811, duly witnessed, acknowledged, and recorded, conveying a certain tract of land in Ohio, and offered further to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence, also, was rejected by the court. A bill of exceptions was taken to these proceedings by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment

was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

The principal question before this court is, whether the deed so executed by Massie was sufficient to convey lands by the laws of Ohio. If not, it was properly rejected; if otherwise, the judgment should be reversed. Two objections have been taken to the execution of this deed; first, that the power of attorney was not duly acknowledged, as every deed is required to be in Ohio in order to convey lands; and if so, then the subsequent conveyance is void, for it is a general principle, that a power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands. On this objection, which is apparently well founded, it is unnecessary to dwell, as another objection is fatal; that is, the deed of Massie was executed in the presence of *one* witness only, whereas the law of Ohio requires all deeds for land to be executed in the presence of *two* witnesses. It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate. The act of Ohio regulating the conveyance of lands, passed on the 14th of February, 1805, provides, "that all deeds for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within this State, shall be signed and sealed by the grantor in the presence of *two* witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this State, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a justice of the peace in any county in this State." Although there are no negative words in this clause, declaring all deeds for the conveyance of lands executed in any other manner to be void; yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and in point of fact such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the State, the evidence was properly rejected by the Circuit Court.

The remaining point, as to the rejection of the evidence of the deed from Smith to Graham, and the proof to show that it was given in exchange for the land in controversy, has not been much relied on in this court. It is, indeed, too plain for argument, that if a deed imperfectly executed would not convey any estate or interest in the land, a parol exchange, or parol proof of an intention to convey the same in exchange, cannot be permitted to have any such effect.¹

Judgment affirmed, with costs.

¹ *Acc. Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Robinson v. Queen*, 87 Tenn. 445; *Shattuck v. Bates*, 92 Wis. 633, 66 N. W. 706. But see *Gates v. Gaither*, 46 La. Ann. 286, 15 So. 50.

Conversely, a deed good according to the law of the situs constitutes a good conveyance, though it is not good according to the law of the place of making. *Post u.*

CAMPBELL v. COON.

COURT OF APPEALS, NEW YORK. 1896.

[Reported 149 New York, 556.]

GRAY, J.¹ The learned judges of the General Term below have reversed the judgment recovered by these plaintiffs in their action for the foreclosure of a mechanic's lien and have ordered a dismissal of the complaint, upon the ground, as we find in the opinion, that "the right to a lien pursuant to the provisions of the Mechanics' Lien Law (Chap. 342, Laws of 1885), does not extend to contracts made and to be performed out of this State." I think that their conclusion was erroneous, and that a consideration of the case fails to disclose any ground for the reversal of the plaintiff's judgment. It appears from this record, following the findings of facts, that the defendant, Amalie Coon, contracted with the Vanderbeck Iron Work Company, a corporation created by the laws of the State of New Jersey, to furnish and erect the iron work in a certain building she was about constructing in the city of New York. That company then made a contract with the plaintiffs, who were also residents of the State of New Jersey, by which the latter agreed to make certain iron lintels and iron separators, at an agreed price and in accordance with the contract between the company and Mrs. Coon, and to deliver the same to the Iron Work Company "at and for the building" in question. The plaintiffs performed their agreement, and the materials called for in their agreement were delivered to the Iron Work Company "at the city of Hoboken in the State of New Jersey and at No. 368 Greenwich Street in the city of New York" (that being the place where the building was being erected), and all of them "were actually used in the construction of the building with the knowledge and consent" of Mrs. Coon. It is perfectly clear, therefore, in the first place, that under their contract the plaintiffs were required to deliver the materials, which they had agreed to furnish to the Iron Work Company, "at and for the building in the city of New York," and, in the second place, that those materials were actually used in its construction, and is there any satisfactory reason for denying to them the protection of the statute because the contract or agreement was one made without the State and between

First Nat. Bank, 138 Ill. 559, 28 N. E. 978; *Manton v. Seiberling*, 107 Ia. 534, 78 N. W. 194; *Succession of Larendon*, 39 La. Ann. 952, 3 So. 219; *Antonelli v. de la Palmira* (French Cassation, 2 Apr. 1884), 12 Clunet, 77.

So the validity of a conveyance is determined by the *lex rei sitæ*. *Moore v. Church*, 70 Ia. 208; *Goddard v. Sawyer*, 9 All. 78; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713.

So of the nature and extent of the interest conveyed, and the state of the title as a result of the conveyance. *McGoon v. Scales*, 9 Wall. 41; *Glover v. U. S.* 29 Ct. Cl. 236; *Danner v. Brewer*, 69 Ala. 191; *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348, 46 N. W. 570. — Ed.

¹ Part of the opinion is omitted. — Ed.

non-residents of the State? I see no reason for so narrowly construing the provisions of the Mechanics' Lien Law. By its terms "any person" may have a lien, who shall have furnished any materials, which have been used in the erection of any building within any of the cities or counties of this State. Undoubtedly, the statute has no extra-territorial force, and was intended for the protection of those furnishing materials within this State; as it was held by this court in the case of *The Birmingham Iron Foundry v. The Glen Cove Starch Manufacturing Company*, 78 N. Y. 80, a case cited, and relied upon, in the opinion of the General Term. The facts, however, in that case were quite other than those before us. There, the defendant, a New York corporation, ordered the construction of a steam engine by the Woodruff Company, a Connecticut corporation, and the bed plate for the engine the Woodruff Company ordered of the plaintiff, also a Connecticut corporation. Under the contract between the defendant and the Woodruff Company, the engine was to be delivered to the defendant at Hartford, in the State of Connecticut, and the bed plate for the engine, under the sub-contract with the plaintiff, was also to be delivered at that city. The delivery of the engine, complete, was in fact made to the defendant at Hartford and the defendant brought it into this State and to its factory. Under these circumstances, it was very properly decided, inasmuch as when the engine was brought into this State it belonged to the defendant, that the plaintiff "furnished no materials in this State," and, therefore, could not claim the benefit of the statute. In this case the fact was, and such was the finding by the referee, that under the plaintiffs' agreement they were to deliver the materials at and for the building in New York City, which the defendant was to put up, and they performed their agreement in that respect and their materials were actually used in its construction.

In the opinion of the General Term, stress is laid upon the fact that no place of payment was specified, and it was reasoned that because the State, wherein the contract was made and the contracting parties resided, was in legal contemplation the place for payment, no right could be deemed to exist under the statute entitling the plaintiffs to a lien upon the building for their security. That proposition again assumes for the statute a purpose which, in our judgment, is not conveyed by its language. The operation of the Mechanics' Lien Law does not depend upon such incidents of the contract with the materialman as relate to its character, or to the place of payment; but solely upon the fact that the materialman has performed labor upon, or furnished materials to, any building within the State. The very case to which the General Term opinion refers, and which we have cited above, rested, in its decision, upon the fact that the plaintiff had really furnished no materials in this State. The language of this act is very broad and we perceive no limitation in its language, nor any good reason for reading one into it, by which the mechanic is required to be a resident of the State and to make his contract here. The materials must have been

furnished and used in the erection of a building within a city or county of this State and, when that is the case, the right of the materialman to a lien follows, if the provisions of the statute are otherwise complied with.¹

SECTION III.

MOVABLES.

CAMMELL v. SEWELL.

EXCHEQUER CHAMBER. 1860.

[Reported 5 Hurlstone & Norman, 728.]

TROVER for deals, with a count for money had and received. At the trial a verdict was taken for the plaintiffs, subject to a special case, which was substantially as follows. The plaintiffs were underwriters at Hull; the defendants merchants in London. The action was brought to recover part of a cargo of deals shipped on board the Prussian ship "Augusta Bertha" at Onega, in Russia, by the Onega Wood Company, for Messrs. Simpson & Whaplate, of Hull, and by them insured with the plaintiffs. The plaintiffs had paid Messrs. Simpson & Whaplate as for a total loss.

The "Augusta Bertha" having put into Haroe Roads, in Norway, in consequence of the shifting of her deck cargo, drove from her anchorage on the rocks at Smaage, about three miles from Molde. The cargo was discharged and the vessel abandoned, and the master sold the cargo by auction (against the protest of the representative of the consignees) to one Hans Clausen, who consigned them to the defendants. The cargo was sold by the defendants for an amount greater than the insurance money paid by the plaintiffs.

By the law of Norway, the sale by auction passed a good title to the purchaser, even if the master, as between himself and the owners, was acting wrongfully. The representative of the consignees instituted a suit in the Superior Diocesan Court of Trondjhem to set aside the sale; but the court confirmed the sale.

The Court of Exchequer ordered the verdict for the plaintiffs to be

¹ *Acc. Thurman v. Kyle*, 71 Ga. 628; *U. S. Inv. Co. v. Phelps & Bigelow W. M. Co.*, 54 Kan. 144, 37 Pac. 982; *Pullis Bros. Iron Co. v. Natchitoches*, 51 La. Ann. 1377, 26 So. 402.

So generally the extent of a creditor's rights to enforce payment out of the debtor's land is determined by the *lex rei sitæ*. *Harrison v. Harrison*, L. R. 8 Ch. 342; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Ins. Co.*, 96 U. S. 627; *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15. — Ed.

set aside, and a verdict entered for the defendant; and the plaintiffs brought the case into the Exchequer Chamber on a writ of error.¹

CROMPTON, J. In this case the majority of the court (COCKBURN, C. J., WIGHTMAN, WILLIAMS, CROMPTON, and KEATING, JJ.) are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment *in rem*, nor are we satisfied that the defendants in the present action were estopped by the judgment of that court, or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognize the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are, did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognize that law? The question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well

¹ This short statement of facts is substituted for that of the Reporters in 3 H. & N. 617. Arguments of counsel are omitted. In the course of the argument, COCKBURN, C. J., said: "If a person sends goods to a foreign country it may well be that he is bound by the law of that country; but here the goods were wrecked on the coast of Norway, and came there without the owner's assent. Could the arrival of the goods there enlarge the captain's authority?" — ED.

be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighborhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our courts for a conversion, and can it alter the case if he resell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them, it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of the "*Eliza Cornish*" or "*Segredo*," before the judge of the Court of Admiralty. 1 Eccl. & Adm. 36. If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect

due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a court of error. We must remark, also, that in the case of *Freeman v. The East India Company*, 5 B. & Ald. 617, the Court of Queen's Bench appear to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of *Freeman v. The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked, also, that Lord Stowell, in the passage, cited in the case of *Freeman v. The East India Company*, from his judgment in the case of the "*Gratitudine*," states that if the master acts unwisely in his decision as to selling, still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of the "*Eliza Cornish*," as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and, as the law of Norway appears to us, on the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN, C. J. Concurring in the judgment delivered by my brother CROMPTON, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or

of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument. But no evidence was adduced to show what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus, — a good contract of sale to transfer the property in Norway, without anything to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

BYLES, J., dissented.

*Judgment affirmed.*¹

LANGWORTHY v. LITTLE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[*Reported 12 Cushing, 109.*]

THIS was an action of tort for a horse and buggy wagon, attached by the defendant, a deputy-sheriff, as the property of one Charles E. McCarty, September 11, 1849. The plaintiff, an inhabitant of Hillsdale, in the State of New York, claimed title under a prior mortgage from said McCarty, made and dated at said Hillsdale, September 1, 1849, at which time the property was at Hillsdale, and in the possession of said McCarty. The mortgage was duly filed in the town-clerk's office of Hillsdale, according to the laws of New York, which were produced and read at the trial in the Court of Common Pleas. Rev. Sts. of New York, vol. 2, p. 71. The plaintiff also proved a due demand on the defendant for the payment of the amount due him on said mortgage, pursuant to Rev. Sts. c. 90, § 79, and that payment was refused. The defendant offered to prove that said McCarty, the mortgagor, at

¹ The general rule that the passing of title to a chattel is determined by the law of the situs, not by that of the place of making the contract of transfer, nor by that of the domicile of the owner, is well established. *Mackey v. Pettyjohn*, 6 Kan. App. 57, 49 Pac. 636; *Ames v. McCamber*, 124 Mass. 85. (See, however, *N. W. Bank v. Poynter* [1895], A. C. 56; *Fonke v. Fleming*, 13 Md. 392.) Thus the requirements as to registration depend upon the law of the situs. *Coote v. Jecks*, L. R. 13 Eq. 597; *Gosline v. Dunbar*, 32 N. B. 325. If the title has passed by the law of the situs, the new title is recognized in any State into which the goods may be brought; and this although by the law of the latter State the title would not have passed. This rule obtains whether the title passed by consent of the parties, *Rabun v. Rabun*, 15 La. Ann. 471; *Sleeper v. Pa. R. R.*, 100 Pa. 259; or by operation of law, as, for instance, by the statute of limitations. *Shelby v. Guy*, 11 Wheat. 361; *Brown v. Brown*, 5 Ala. 508; *Waters v. Barton*, 1 Cold. 450. — ED.

the time of making the mortgage, resided in the town of Mount Washington, in this county; and after the mortgage was made, immediately returned with it to this State, and the same remained here in his possession, until it was attached by the defendant, on a writ in favor of citizens of Connecticut, who had no knowledge of the mortgage; nor was the same recorded in the town of Mount Washington. *Mellen, J.*, ruled that these facts constituted no defence to the action, and the verdict being for the plaintiff, the defendant excepted to such ruling. The other facts of the case are stated in the opinion.¹

SHAW, C. J. This mortgage of personal property was made in New York, the property then being there, to a citizen of New York, there residing, recorded in the town-clerk's office in the town of Hillsdale, New York, and so made as to be valid, and bind the property in that State. Being removed into Massachusetts, it was here attached by the defendant, as the property of the mortgagor. The property in question was a horse and buggy wagon, and it appeared that the horse and wagon were sold by the plaintiff at Hillsdale, to McCarty, the mortgagor, and mortgaged back at the same time, to secure McCarty's note given at the same time, in part payment for said purchase. The plaintiff, by this conveyance, acquired a good qualified title to the property, by the laws of the State of New York, a property sufficient to enable him to maintain trover against a wrongdoer; and an officer attaching the property as the property of the mortgagor, especially without paying, and in fact refusing to pay the debt of the mortgagee, when notified to him and demanded of him, is as to him a wrongdoer. A party who obtains a good title to property, absolute or qualified, by the laws of a sister State, is entitled to maintain and enforce those rights in this State. It is a case where the *lex loci contractus* must govern.

We think there is no ground for the argument, that by the St. 1843, c. 72, this mortgage should have been recorded by the clerk of the town where the mortgagor resides, and also of the town where he principally transacts his business, or follows his calling, and that said statute obviously applies only to mortgages made in Massachusetts.

*Exceptions overruled.*²

¹ Arguments of counsel are omitted. — Ed.

² *Acc.* U. S. Bank v. Lee, 13 Pet. 107; *Alferitz v. Ingalls*, 83 Fed. 964; *Beall v. Williamson*, 14 Ala. 55; *Hall v. Pillow*, 31 Ark. 32; *Ballard v. Winter*, 39 Conn. 179; *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655; *Mumford v. Cauty*, 50 Ill. 370; *Smith v. McLean*, 24 Ia. 322; *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Barker v. Stacy*, 25 Miss. 471; *Smith v. Hutchings*, 30 Mo. 380; *Offutt v. Flagg*, 10 N. H. 46; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721; *Wilson v. Rustad*, 7 N. D. 330, 75 N. W. 260; *Kanaga v. Taylor*, 7 Ohio S. 134; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *Crenshaw v. Anthony, Mart. & Y.* 102; *Craig v. Williams*, 90 Va. 500, 185 E. 899; *McGregor v. Kerr*, 29 N. S. 45.

Contra, *Wilson v. Carson*, 12 Md. 54; *Corbett v. Littlefield*, 84 Mich. 30 (see *Vining v. Millar*, 109 Mich. 205, 67 N. W. 126); *Armitage v. Spahn*, 4 Pa. Dist. Ct. 270. And see *Jones v. Taylor*, 30 Vt. 42.

In *Greenville Nat. Bank v. E. S. B. Co.*, *supra*, *BURWELL, J.*, said: "If these mortgages were valid mortgages where executed and where the property was located

GREEN v. VAN BUSKIRK.

SUPREME COURT OF THE UNITED STATES. 1866, 1866.

[Reported 5 Wallace, 307; 7 Wallace, 139.]

MOTION to dismiss a writ of error to the Supreme Court of the State of New York.

The Constitution of the United States declares (Section 1, Article 4) that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Under the power here conferred, Congress, by act of 1790, May 26, 1 Stat. at Large, 122, provides that records, authenticated in a way which it prescribes, shall "have such faith and credit given to them in every other court of the United States as they have by law or usage in the court from which they are taken."

With this provision of the Constitution and this law in force, Bates being the owner of certain iron safes at Chicago, in the State of Illinois, on the 3d day of November, 1857, executed and delivered, in the State of New York, to Van Buskirk and others, a chattel mortgage of them. On the 5th day of the same month Green caused to be levied on the same safes a writ of attachment, sued by him out of the proper court in Illinois, against the property of Bates. The attachment suit proceeded to judgment, and the safes were sold in satisfaction of Green's debt. Van Buskirk, Green, and Bates were all citizens of New York. Green's attachment was levied on the safes as the property of Bates, before the possession was delivered to Van Buskirk, and before the mortgage from Bates to him was recorded, and before notice of its existence.

Van Buskirk afterwards sued Green, in the New York courts, for the value of the safes thus sold under his attachment, and Green pleaded the proceeding in the court of Illinois in bar of the action. In this suit thus brought by him in the New York courts, Van Buskirk obtained judgment, and the judgment was affirmed in the highest court of the State of New York. From this affirmance Green took a writ of error to this court, assuming the case to fall within the twenty-fifth section of the Judiciary Act, which gives such writ in any case wherein is drawn in question a clause of the Constitution of the United States, and the

at the time, the rights of the mortgagee are vested rights which cannot be taken away from it. . . . We have no doubt but that the legislature has the power to enact a law providing for the filing of chattel mortgages executed in another State within a reasonable time after the mortgaged property is brought into this territory, and to provide that such mortgage shall be absolutely void as against creditors, and purchasers, and incumbrancers in good faith for value, if not filed within the time fixed; but this has not been done."

decision is against the title, right, or privilege specially set up. His assumption was that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the decision of the courts of New York, and that in such denial, those courts decided against a right claimed by him under the above-mentioned Section 1, Article 4, of the Constitution, and the act of Congress of May 26, 1790, on the subject of it.¹

MILLER, J. The section of the Constitution discussed in this case, declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State: and that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The act of 1790 was intended to be an exercise of the power conferred upon Congress by this section. In the leading case of *Mills v. Duryee*, 7 Cranch, 481, this court held that the act in question did declare the effect of such judicial records, and that it should be the same in other States as that in which the proceedings were had. In the case of *Christmas v. Russell*, 5 Wall. 290, decided at the present term of the court, we have reaffirmed this doctrine, and have further declared that no State can impair the effect thus to be given to judicial proceedings in her sister State, by a statute of limitation intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered.

The record before us contains the pleadings in the case, the facts found by the court, and the conclusions of law arising thereon. And notwithstanding the inverted manner in which the court has stated its legal conclusions, it seems clear that it did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest. The case is not varied by declaring that the mortgage made and delivered in New York overreached the subsequent attachment in Illinois. According to the view taken by that court, Van Buskirk, the plaintiff, had title to the property under the laws of New York by virtue of his mortgage, and the question to be decided was whether the proceedings in Illinois were paramount in their effect upon the title to the New York mortgage.

It is said that Van Buskirk being no party to the proceedings in Illinois was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him; and, strictly speaking, this is true. He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim, and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to show that the property was not liable to the attachment, — a right from which he would

¹ Arguments of counsel are omitted. — Ed.

have been barred if he had been a party to that suit. And this question of the liability of the property in controversy to that attachment is the question which was raised by the suit in New York, and which was there decided. That court said that this question must be decided by the laws of the State of New York, because that was the domicile of the owner at the time the conflicting claims to the property originated.

We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the courts of that State, under which it was sold.

There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicile of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. *Taylor v. Boardman*, 25 Vt. 589; *Ward v. Morrison*, id. 593; *Emmerson v. Partridge*, 27 Vt. 8; *Oliver v. Townes*, 14 Mart. La. 93; *Norris v. Mumford*, 4 Mart. La. 20. Such also seems to have been the view of the Supreme Court of Massachusetts. *Lanfear v. Sumner*, 17 Mass. 110.

But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule. The learned commentator, already referred to, in speaking of the law in Louisiana which gives paramount title to an attaching creditor over a transfer made in another State, which is the domicile of the owner of the property, says: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy." Story on the Conflict of Laws, § 390. Again, he says: "Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests."

Chancellor Kent, in commenting on a kindred subject, namely, the law of contracts, remarks, 2 Com. 599: "But, on this subject of conflicting laws, it may be generally observed that there is a stubborn

principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is, that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."

In the case of *Milne v. Moreton*, 6 Bin. 361, the Supreme Court of Pennsylvania says, that "every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure."

The Louisiana court, in a leading case on this subject, gives, in the following language, a clear statement of the foundation of this principle: "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity. . . . If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it."

Apart from the question of authority, let us look at some of the consequences of the doctrine held by the court of New York.

If the judgment rendered against the plaintiff in error is well founded, then the sheriff who served the writ of attachment, the one who sold the property on execution, any person holding it in custody pending the attachment proceeding, the purchaser at the sale, and all who have since exercised control over it, are equally liable.

If the judgment in the State of Illinois, while it protects all such persons against a suit in that State, is no protection anywhere else, it follows that in every case where personal property has been seized under attachment, or execution against a non-resident debtor, the officer whose duty it was to seize it, and any other person having any of the relations above described to the proceeding, may be sued in any other State, and subjected to heavy damages by reason of secret transfers of which they could know nothing, and which were of no force in the jurisdiction where the proceedings were had, and where the property was located.

Another consequence is that the debtor of a non-resident may be sued by garnishee process, or by foreign attachment as it is sometimes called, and be compelled to pay the debt to some one having a demand against his creditors; but if he can be caught in some other State, he may be made to pay the debt again to some person who had an assignment of it, of which he was ignorant when he was attached.

The article of the Constitution, and the act of Congress relied on by the plaintiff in error, if not expressly designed for such cases as these, find in them occasions for their most beneficent operation.

We do not here decide that the proceedings in the State of Illinois have there the effect which plaintiff claims for them, because that

must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there, by the law and usage of that State, was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review.

Motion to dismiss overruled.

NELSON and SWAYNE, JJ., dissenting.

DAVIS, J. [on the merits].¹ It should be borne in mind in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defence. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But as by the law of Illinois Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment, and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings.

Attachment laws, to use the words of Chancellor Kent, "are legal modes of acquiring title to property by operation of law." They exist in every State for the furtherance of justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a State, and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The Vice-Chancellor of New York, in *Cochran v. Fitch*, 1 Sandf. Ch. 146, when discussing the effect of certain attachment proceedings in the State of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction *in rem* against the complainant, it follows that I am bound in this State to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another State, without service of process or appearance, as being nullities in that State and void, the same vice-chancellor says: "But these expressions are all to be referred to the cases then under

¹ Part of the opinion is omitted. — Ed.

consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defence to justify the conduct of the attaching creditor, is manifest and supported by authority. *Cochran v. Fitch*, 1 Sandf. Ch. 146; *Kane v. Cook*, 8 Cal. 449. Chief Justice Parker, in *Hall v. Williams*, 6 Pick. 232, speaking of the force and effect of judgments recovered in other States, says: "Such a judgment is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of the citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case, induces us to notice the ground on which they rested their decision. It is, that the law of the State of New York is to govern this transaction, and not the law of the State of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." It has yielded in New York on the power of the State to tax the personal property of one of her citizens, situated in a sister State (*The People ex. rel. Hoyt v. The Commissioner of Taxes*, 23 N. Y. 225), and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a situs entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State, and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule

of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives.

*Judgment for the plaintiff in error.*¹

HERVEY v. RHODE ISLAND LOCOMOTIVE WORKS.

SUPREME COURT OF THE UNITED STATES. 1876.

[Reported 93 *United States*, 664.]

THE Rhode Island Locomotive Works sold to Conant & Co. a locomotive, title to remain in the seller till full payment of the purchase price. The locomotive was delivered to Conant & Co. in Rhode Island, and was by them taken to Illinois. The agreement of sale was not recorded in Illinois according to the law of that State. The locomotive was seized by a sheriff in Illinois as the property of Conant & Co., and was sold by him to Hervey. The Locomotive Works brought an action of replevin in the Circuit Court of the United States for Southern Illinois, to recover possession of the locomotive from Hervey. The court gave judgment for the plaintiff, and the defendant brought this writ of error.²

DAVIS, J. It was decided by this court, in *Green v. Van Buskirk*, 5 Wall. 307, 7 Wall. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former.

The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of

¹ *Acc. Ames Iron Works v. Warren*, 76 Ind. 512; *Keller v. Paine*, 107 N. Y. 83, 13 N. E. 635. — ED.

² This statement is condensed from that of the Reporter. Arguments of counsel are omitted. — ED.

title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the Chattel-Mortgage Act. R. S. Ill. 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or non-resident of the State. If this be not done, the instrument, so far as third persons are concerned, has no validity.

Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick v. Hadden*, 37 Ill. 370; *Ketchum v. Watson*, 24 Ill. 591. Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the purchaser who is in possession of it. This was held in *Murch v. Wright*, 46 Ill. 488. In that case the purchaser took from the seller a piano at the price of \$700. He paid \$50 down, which was called rent for the first month, and agreed to pay, as rent, \$50 each month, until the whole amount should be paid, when he was to own the piano. The court held, "that it was a mere subterfuge to call the transaction a lease," and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his instalments, — a contract legal and valid as between the parties, but subjecting the vendor to lose his lien in case the property, while in possession of the purchaser, should be levied upon by his creditors. That case and the one at bar are alike in all essential particulars.

The engine *Smyser*, the only subject of controversy in this suit, was sold on condition that each and all of the instalments should be regularly paid, with a right of rescission on the part of the vendor in case of default in any of the specified payments.

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch v. Wright*, *supra*. There the price of the piano was to be paid in thirteen months, and here, that of the engine, \$12,093.96, in one year. It was evidently not the intention that this large sum should be

paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment? In both cases, the stipulated price of the property was to be paid in short instalments, and no words employed by the parties can have the effect of changing the true nature of the contracts. In the case at bar the agreement contemplated that the engine should be removed to the State of Illinois, and used by Conant & Co. in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the Federal tribunals.

The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien.

By stipulation the judgment of the court below is affirmed as to the locomotive Olney, No. 1.

As to the locomotive and tender called Alfred N. Smyser, No 3,
*Judgment reversed.*¹

EMERY v. CLOUGH.

SUPREME COURT OF NEW HAMPSHIRE. 1885.

[Reported 63 *New Hampshire*, 552.]

BILL IN EQUITY, under General Laws, c. 209, § 2, for discovery, and the restoration of a municipal bond for \$1,000, alleged to belong to the estate of William Emery, the plaintiff's intestate, unlawfully withheld by the defendant.² . . .

The legal domicile of said William Emery during his whole life was at Loudon, in this State. May 21, 1882, being very sick while temporarily at Montpelier, Vt., he delivered to the defendant as a *donatio causa mortis*, the bond in question.

SMITH, J. It is contended on the part of the defendant that the transaction in Vermont, whereby the defendant became possessed of the bond, was a *donatio causa mortis*, valid as an executed contract under the laws of Vermont, and therefore valid here. The plaintiff contends that the transaction was in the nature of a testamentary disposition of property, and if valid in Vermont as a *donatio causa*

¹ *Acc. Marsh v. Ellsworth*, 37 Ala. 85; *Delop v. Windsor*, 26 La. Ann 185; and see *Donald v. Hewitt*, 33 Ala. 534.

² Only so much of the case as involves the validity of the gift of this bond is here given. — ED.

mortis, it is not valid in this State because it was not proved by the testimony of two indifferent witnesses upon petition by the donee to the Probate Court to establish the gift filed within sixty days after the decease of the donor. G. L., c. 193, § 17. The domicile of the parties at the time of the delivery of the bond to the defendant, and ever afterwards, to the death of the donor, being in this State, it is claimed that the neglect of the defendant to establish the gift in the Probate Court is fatal to her right to retain the bond. Every requisite to constitute a valid gift *causa mortis* under the laws of Vermont, where the parties were temporarily residing at the time of the delivery of the bond, was complied with. *Holley v. Adams*, 16 Vt. 206; *Caldwell v. Renfrew*, 33 Vt. 213; *French v. Raymond*, 39 Vt. 623. Every requisite, also, to constitute such a gift under the laws of New Hampshire was complied with except the *post mortem* proceedings required by our statute. The question therefore is, whether the *lex loci* or the *lex domicilii* governs; and the answer to this question depends upon the legal character and effect of such gifts.

A gift *causa mortis* is often spoken of in the books as a testamentary disposition of property, or as being in the nature of a legacy. *Jones v. Brown*, 34 N. H. 439; 1 Wms. Ex'rs, 686, n. 1. And such was the doctrine of the civil law. 2 Kent Com. 444, and authorities cited in note *b*. Such gifts are always made upon condition that they shall be revocable during the lifetime of the donor, and that they shall revert in case he shall survive the donee, or shall be delivered from the peril of death in which they were made. The condition need not be expressed, as it is always implied when the gift is made in the extremity of sickness, or in contemplation of death. It is sometimes, perhaps generally, said in the English cases that a gift *causa mortis* does not vest before the donor's death; but in *Nicholas v. Adams*, 2 Whart. (Pa.) 17, Gibson, C. J., considered this to be inaccurate, holding that this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, deliverance from peril, or from some other act inconsistent with the gift, and indicating the donor's purpose to resume the possession of the gift. 1 Wms. Ex'rs, 686, n. 1; *Marshall v. Berry*, 13 Allen, 48, 46.

A gift *causa mortis* resembles a testamentary disposition of property in this, — that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is, what its name indicates, a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. The donee's possession must continue during the life of the donor, for recovery of possession by the latter is a revocation of the gift. But in case of a legacy, the possession remains with the testator until his decease. The title to a gift *causa mortis* passes by the delivery,

defeasible only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and not through the executor or administrator, and after his death it is liable to be divested only in favor of the donor's creditors. In this respect it stands the same as a gift *inter vivos*. It is defeasible in favor of creditors, not because it is testamentary, but because, as against creditors, one cannot give away his property. A gift *causa mortis* is not subject to probate, nor to contribution with legacies in case the assets are insufficient, nor to any of the incidents of administration. It is not revocable by will, for, as a will does not operate until the decease of the testator, and the donor, at his decease, is divested of his property in the subject of the gift, no right or title in it passes to his representatives. The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee. *Cutting v. Gilman*, 41 N. H. 147, 151; *Marshall v. Berry*, *supra*; *Doty v. Willson*, 47 N. Y. 580, 585; *Dole v. Lincoln*, 31 Me. 422; *Chase v. Redding*, 13 Gray, 418; *Basket v. Hassell*, 107 U. S. 602; 1 Wms. Ex'rs, 686, n. 1. A valid gift *inter vivos* may be made on similar terms. *Worth v. Case*, 42 N. Y. 362; *Dean v. Carruth*, 108 Mass. 242; *Warren v. Durfee*, 126 Mass. 338.

A gift *causa mortis* in some respects may be said to resemble a contract, the mutual consent and concurrent will of both parties being necessary to the validity of the transfer. 2 Kent Com. 437, 438; 1 Pars. Cont. 234. Contracts are commonly understood to mean engagements resulting from negotiation. 2 Kent. Com. 437. And in *Peirce v. Burroughs*, 58 N. H. 302, it was held that the assent of both parties is as necessary to a gift as to a contract.

Prior to the passage of c. 106, Laws of 1883, the law required a will to be executed according to the law of the testator's domicile at the time of his death. *Saunders v. Williams*, 5 N. H. 218; *Heydock's Appeal*, 7 N. H. 496. The distribution of the estate of a deceased person among the heirs or legatees is to be made according to the law of the domicile of the testator or intestate at the time of his death. *Leach v. Pillsbury*, 15 N. H. 137. But the plaintiff's intestate did not die possessed of the bond in suit. It did not vest in his administrator, and is not assets of his estate. The defeasible title which vested in the defendant at the time of the delivery was not defeated by the donor in his lifetime, and his right and power to defeat it ceased with his death. A gift *causa mortis* is not a testament. If it is a contract, in this case it was executed in Vermont in the life of the plaintiff's intestate. If it is not a contract, as that term is commonly understood, it is a gift which received the assent of both parties, and nothing remained to perfect the conditional title of the defendant before the decease of the donor. The transfer of the bond being, therefore, either an executed contract or a perfected gift in Vermont, and valid under the laws of

Vermont, is valid here; and no question arises whether our statute (G. L., c. 198, § 17) affects the contract or the remedy. That section applies to gifts made in this State. *Case discharged.*

MARVIN SAFE COMPANY v. NORTON.

SUPREME COURT OF NEW JERSEY. 1886.

[*Reported 48 New Jersey Law, 410.*]

ON May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument: —

“ May 1st, 1884.

“ *Marvin Safe Company:*

“ Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars (\$84), seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said instalments or notes, when same shall become due, then all of said instalments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith. SAMUEL N. SCHWARTZ.

“ Mark — Samuel N. Schwartz, Hightstown, New Jersey.

“ Route — New Jersey.

“ Not accountable for damages after shipment.”

Schwartz paid the first instalment of \$7 May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two instalments, of \$7 each, by remittance to Philadelphia by check. Nothing more was paid.

On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55. Norton paid him the purchase-money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe and removed it to his office. Schwartz is insolvent and has absconded.

The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment, on the ground that the defendant, having bought and paid for the safe *bona fide*, the title to the safe, by the law of Pennsylvania, was transferred to him.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally, the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that State hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and *bona fide* purchasers from him; but that upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser or a *bona fide* purchaser from him. *Clow v. Woods*, 5 S. & R. 275; *Enlow v. Klein*, 79 Penn. St. 488; *Haak v. Linderman*, 64 Penn. St. 499; *Stadfeld v. Huntsman*, 92 Penn. St. 53; *Brunswick v. Hoover*, 95 Penn. St. 508; 1 Benj. on Sales (Corbin's ed.), § 446; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*.

In the most recent case in the Supreme Court of Pennsylvania Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but as to creditors, the latter is good while the former is invalid." *Forest v. Nelson*, 19 Rep. 38; 108 Penn. St. 481.

The cases cited show that the Pennsylvania courts hold the same doctrine with respect to *bona fide* purchasers as to creditors.

In this State, and in nearly all of our sister States, conditional sales — that is, sales of personal property on credit, with delivery of possession to the purchaser and a stipulation that the title shall remain in the vendor until the contract price is paid — have been held valid, not only against the immediate purchaser, but also against his creditors and *bona fide* purchasers from him, unless the vendor has conferred upon his vendee *indicia* of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 13 Vroom, 308; *Midland R. R. Co. v. Hitchcock*, 10 Stew. Eq. 549, 559; 1 Benj. on Sales (Corbin's ed.), §§ 437-460; 1 Smith's Lead. Cas. (8th ed.) 33-90; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*; 15 Am. Law Rev. 380, tit. "Conversion by Purchase." The doctrine of the courts of Pennsylvania is

founded upon the doctrine of *Twyne's Case*, 3 Rep. 80, and *Edwards v. Harbin*, 2 T. R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud — a doctrine repudiated quite generally by the courts of this country, and especially in this State. *Runyon v. Groshon*, 1 Beas. 86; *Broadway Bank v. McElrath*, 2 Beas. 24; *Miller ads. Pancoast*, 5 Dutch. 250. The doctrine of the Pennsylvania courts is disapproved by the American editors of *Smith's Leading Cases* in the note to *Twyne's Case*, 1 Sm. Lead Cas. (8th ed.) 33, 34, and by Mr. Landreth in his note to *Lewis v. McCabe*, 30 Am. Law Reg. 224; but nevertheless the Supreme Court of that State, in the latest case on the subject — *Forest v. Nelson*, decided February 16, 1885 — has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him *bona fide*, by a levy under execution or a *bona fide* purchase, will acquire a better title than the original purchaser had — a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. on Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract was thereupon complete.

The validity, construction, and legal effect of a contract may depend either upon the law of the place where it is made or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Fredericks v. Frazier*, 4 Zab. 162; *Dacosta v. Davis*, 4 Zab. 319; *Bulkley v. Honold*, 19 How. 390; *Scudder v. Union National Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124; *Morgan v. N. O., M. & T. R. R. Co.*, 2 Woods, 244; *Simpson v. Fogo*, 9 Jur. (n. s.) 403; *Whart. Confl. of Law*, §§ 341, 345, 401, 403, 418; *Parr v. Brady*, 8 Vroom, 201. The contract between Schwartz and the company having been made, and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that State

the condition expressed in the contract of sale that the safe company should not relinquish title until the contract price was paid, and that on the failure to pay any of the instalments of the price the company might resume possession of the property, was valid as between Schwartz and the company. By his contract Schwartz obtained possession of the safe and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs the safe was brought into this State, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe was made at Hightstown in this State. The property was then in this State, and the contract of purchase was executed by delivery of possession in this State. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this State. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this State. By the law of this State Norton, by his purchase, acquired only the title of his vendor, — only such title as the vendor had when the property was brought into this State and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that therefore his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a *bona fide* purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts that a reservation of title in the vendor upon a conditional sale is void as against creditors and *bona fide* purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that State. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud and a forfeiture of the vendor's reserved title as in favor of creditors and *bona fide* purchasers. The doctrine is founded upon considerations of public policy adopted in that State, and applies to the fact of possession and acts of owner-

ship under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract. In *McCabe v. Blymyry*, 9 Phila. Rep. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the State where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that State; that the mortgagee, by allowing the mortgagor to retain possession of the property and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right under the mortgage as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that State. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another State, as against a *bona fide* purchaser who had bought the property of the mortgagor in this State, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this State. *Parr v. Brady*, 8 Vroom, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand the safe was removed to this State by Schwartz as soon as he became the purchaser. His possession under the contract has been exclusively in this State. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that State; nor the public policy of this State, for in this State possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this State, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this State; for, by the law of Pennsylvania, creditors and *bona fide* purchasers are put upon the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded. Under such a condition of the law confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this State, would depend, not upon our laws, but upon the laws and public policy of sister States or foreign countries. A purchaser of chattels in this State, which his vendor had obtained in New York or in most of our sister States under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title — the continued possession and exercise of acts of ownership over it by Schwartz and the purchase by Norton — occurred in this State. The legal effect and consequences of those acts must be adjudged by the law of this State. By the law of this State it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this State Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which, by our law, will give him a better title.

*The judgment should be reversed.*¹

CLEVELAND MACHINE WORKS v. LANG.

SUPREME COURT OF NEW HAMPSHIRE. 1892.

[Reported 67 *New Hampshire*, 348.]

REPLEVIN for two machines situate in the Granite Mills in Northfield, and attached as both real and personal estate by the defendant, a deputy sheriff, on a writ in favor of Denny, Rice & Co. against Edward P. Parsons. The negotiations for the machines were had and completed with the plaintiffs in Worcester, Mass., by one Green, as agent for Parsons, who resided in Boston. The machines were shipped by the plaintiff from Worcester to Northfield, and were there set up by an employee of the plaintiff, under an agreement by which the title to the machines was to remain in the plaintiff until the entire price was paid. Parsons never paid for the machines. At the time of the Denny, Rice & Co. attachment neither they nor the defendant had notice of the plaintiff's lien.²

CLARK, J. By the terms of the contract the machines were to remain the property of the Cleveland Machine Works until paid for. The contract was negotiated in Massachusetts, by citizens of Massachusetts, respecting property situated in Massachusetts. The shipment of the machines at Worcester — Parsons paying the freight from that point — made Worcester the place of delivery, and vested in Parsons all the right and interest he ever acquired in the property. The agreement to send a man to set up the machines at Northfield was not a condition precedent to the vesting of the conditional title in Parsons, any more than an agreement to furnish instruction as to the mode of operating the machines would have been. The written agreement

¹ *Acc. Weinstein v. Freyer*, 93 Ala. 257; *Public Parks Amusement Co. v. Carriage Co.*, 64 Ark. 29, 40 S. W. 582. — ED.

² This statement is condensed from that of the Reporter. Arguments of counsel are omitted. — ED.

shows that the parties understood that the conditional title passed upon the shipment of the machines, by fixing the times of payment from that date. The contract was a conditional sale of chattels in Massachusetts, negotiated and completed there by Massachusetts parties, and valid by the law of Massachusetts; and being valid where it was made, its validity was not affected by the subsequent removal of the property to New Hampshire. *Sessions v. Little*, 9 N. H. 271; *Smith v. Godfrey*, 28 N. H. 379; *Stevens v. Norris*, 30 N. H. 466.

As a general rule, contracts respecting the sale or transfer of personal property, valid where made and where the property is situated, will be upheld and enforced in another State or country, although not executed according to the law of the latter State, unless such enforcement would be in contravention of positive law and public interests. A personal mortgage of property in another State, executed and recorded according to the laws of that State, is valid against the creditors of the mortgagor attaching the property in this State, although the mortgage is not recorded here. *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86. A mortgagor of horses in Massachusetts, bringing them into this State, cannot subject them to a lien for their keeping against the Massachusetts mortgagee. *Sargent v. Usher*, 55 N. H. 287. A boarding-house keeper's lien under the laws of Massachusetts is not lost by bringing the property into this State. *Jaquith v. American Express Co.*, 60 N. H. 61.

Formerly by the law of Vermont a chattel mortgage was invalid against creditors of the mortgagor if the property remained in his possession. But it was held both in Vermont and in New Hampshire that a mortgage of personal property in New Hampshire, duly executed and recorded according to the law of New Hampshire, was valid against creditors of the mortgagor attaching the property in his possession in Vermont. *Cobb v. Buswell*, 37 Vt. 337; *Lathe v. Schoff*, 60 N. H. 34. In *Cobb v. Buswell* the property was taken to Vermont with the consent of the mortgagee, and in *Lathe v. Schoff* it was understood, when the mortgage was executed, that the horses mortgaged were to be removed to Vermont by the mortgagor and kept there after the season of summer travel closed. So a chattel mortgage made by a citizen of Massachusetts temporarily in New York with the mortgaged property, if valid by the law of New York, is valid against the creditors of the mortgagor attaching the property in his possession in Massachusetts. *Langworthy v. Little*, 12 Cush. 109.

The law of New Hampshire respecting conditional sales has no extra-territorial force, and does not apply to sales made out of the State. Neither the parties nor the subject-matter of the contract respecting the machines were within its operation. If the conditional sale had been made in this State before the statute was enacted requiring an affidavit of the good faith of the transaction and a record in the town clerk's office, it would not have been affected by the statute. When the machines were brought to this State, there was no provision of the

statute for recording the plaintiffs' lien. There was no change or transfer of title in this State, and the title of the plaintiffs, valid against creditors under a contract completed in Massachusetts, was not destroyed by the removal of the property to New Hampshire.

Smith v. Moore, 11 N. H. 55, cited by the defendant as sustaining the position that the plaintiffs' lien was destroyed because there was no law in this State providing for a record in such a case, is an authority against the defendant. In that case the property was in this State when the mortgage was made, the mortgagor residing out of the State. The court say, "If the property had been situated out of the State when the mortgage was made, and the mortgage had been valid according to the law of the place, a subsequent removal of the property to this State would not have affected its validity," citing Offutt v. Flagg, 10 N. H. 46.

Conditional sales were valid in this State without record until January 1, 1886. McFarland v. Farmer, 42 N. H. 386; Holt v. Holt, 58 N. H. 276; Weeks v. Pike, 60 N. H. 447. The statute of 1885, c. 30, had no application to contracts between parties residing out of the State, and made no provision for recording such contracts. The fact that the contract is not within the statute is an answer to the position that the plaintiffs' title is to be tested by the law of New Hampshire.

The attachment of the real estate gave the defendant no possession of or right of property in the machines. Scott v. Manchester Print Works, 44 N. H. 507. By attaching them as personal property, the defendant claims to hold the possession and property in them, as the property of Parsons, for the benefit of the attaching creditors. If Parsons had an attachable interest subject to the plaintiffs' lien, the defendant's claim to hold the entire property under the attachment entitles the plaintiffs to maintain replevin, if they have any title to the machines and there is no estoppel. As between the plaintiffs and Parsons, the machines were the property of the plaintiffs. They were never the property of Parsons. He was simply a bailee, and never claimed to own them.

"Judgment and execution liens attach to the defendant's real, instead of his apparent, interest in the property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto and before the sale." Freem. Ex., § 335. A purchaser at a sheriff's sale, there being no estoppel, acquires no title to property not belonging to the debtor. Bryant v. Whitcher, 52 N. H. 158.

An attaching creditor is not in the position of a purchaser for a valuable consideration without notice of any defect of title. The defendant, and the creditors of Parsons whom he represents, do not occupy the relation of *bona fide* vendees or mortgagees for value without notice. They stand no better than Parsons, who never owned or claimed to own the machines. Their claim to hold the property against the plaintiffs'

title is based upon Parsons's ownership, and not upon any attempted transfer of title by him to them; and as he had no title they took nothing by the attachment.

The case has no analogy to an attachment of property to which the debtor has a voidable title valid until rescinded (*Bradley v. Obear*, 10 N. H. 477), or to the numerous class of cases where the debtor once had a valid title which he has conveyed or transferred in fraud of creditors.

As Parsons had no title to the machines, and as no legal or equitable ground of estoppel to the assertion of the plaintiffs' title is shown, the plaintiffs are entitled to judgment.

*Judgment for the plaintiffs.*¹

KNOWLES LOOM WORKS v. VACHER.

SUPREME COURT, NEW JERSEY. 1895.

[Reported 57 *New Jersey Law*, 490.]

THIS suit relates to the title of ten silk looms which, about August 1st, 1893, were in the possession of the defendants, and were then replevied by the plaintiff, and returned under bond to the defendants.

The value of the looms was then \$1,487.50, which amount, with interest thereon, from August 1, 1893, the plaintiff will be entitled to recover if it be entitled to a judgment. The looms were originally the property of the plaintiff, a Massachusetts corporation, located in Worcester, Massachusetts, and were delivered by it to the Paris Silk Company, a New Jersey corporation, located in Paterson, under a contract for the sale of them made orally in the city of New York between an agent of the plaintiff and an agent of the Paris Silk Company. According to the terms of the contract the looms were to remain the property of the plaintiff until they were fully paid for, and were to be paid for in instalments, at periods ranging from thirty days to six months after delivery.

This contract was never formally reduced to writing, but its terms can be gathered from letters written to each other by the parties in Worcester and Paterson, which refer to the oral contract.

In pursuance of the contract, the looms were delivered by the plaintiff to the silk company, in Paterson, in the latter part of May, 1893, and shortly afterwards notes were given by the silk company to the plaintiff for the amount of the purchase-money. Those notes have never been paid, and after the maturity of the note first due the plain-

¹ *Acc. G. A. Gray Co. v. Taylor Bros. Iron-Works Co.* 66 Fed. 686; *Drew v. Smith*, 59 Me. 393; *Barrett v. Kelley*, 66 Vt. 515, 29 Atl. 809; *Mershon v. Moors*, 76 Wis. 502. See *Ensley L. Co. v. Lewis*, 121 Ala. 94, 25 So. 729. — Ed.

tiff tendered them all back to the silk company before issuing the writ in this cause. On July 5, 1893, the looms being in the possession of the Paris Silk Company, at Paterson, were mortgaged by that company to the defendant Hoguet, to secure a pre-existing debt due from the company to Hoguet, Mr. Hoguet having agreed with the company that whatever he realized from the mortgage he would distribute among the creditors of the Paris Silk Company proportionately. At that time the silk company was insolvent, and Hoguet knew it, but he had no notice that the looms were not the property of the Paris Silk Company. The title which the defendants now set up depends upon that mortgage. Whether, under these circumstances, the plaintiff or the defendants are entitled to the judgment of the court, is a question reserved and certified to the Supreme Court for its advisory opinion.

VAN SYCKEL, J.¹ On behalf of the defendants, it is insisted that the sale by the plaintiff to the silk company, being a conditional one, was void as against the mortgage of Hoguet by virtue of the provisions of the act of May 9, 1889, entitled "An act requiring contracts for the conditional sale of personal property to be recorded." Pamph. L., p. 421. . . .

The silk company was the party contracting to buy, and was a resident of this State, located at the city of Paterson, in the county of Passaic. The contract of sale was not recorded, as required by the act of 1889.

Two points are involved :

First, whether the statute of 1889 is applicable to this case, in view of the fact that the contract of sale was made in the State of New York ; and, second, whether the defendant Hoguet, in taking a mortgage to secure a pre-existing debt due from the Paris Silk Company to him, became a mortgagee in good faith.

The act of 1889 directs the contract to be recorded in the county where the buyer resides, if a resident of this State at the time of the execution of the contract, and if not a resident of this State, then in the county where the property shall be at the time of the execution of such instrument.

The manifest purpose of the act is to render inefficacious the conditional sale of all goods held in this State where the contract of sale is not recorded.

There is an implied mandate in the act that the contract of sale shall be in writing, otherwise it could not be recorded and the act would be futile.

The situs of the property, and not the *lex loci contractus*, determines the validity of such sales.

The contract in this case was made in New York, but the property was to be delivered, and was delivered to, and held by the purchaser in this State.

Great contention and uncertainty as to the title to personal property

¹ Part of the opinion is omitted. — Ed.

would be produced if purchasers and mortgagees were bound to ascertain whether the vendor or mortgagor acquired title in another State before they could contract with safety in reference to it.

Judicial decision in this State has been hostile to such an interpretation of the law. *Marvin Safe Co. v. Norton*, 19 Vroom, 410.

Where the situs of personal property is in this State, it is subject to our statutory provisions in the adjudications regarding it in our own courts, in a suit to which a citizen of this State is a party.

The force of our statutes is recognized in *Varnum v. Camp*, 1 Gr. 326, and in *Bentley v. Whittemore*, 4 C. E. Gr. 462.

"No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and grantors, be deemed justly open to reproach of being founded in a narrow or selfish policy." Story, *Confl. L.*, § 390.

It seems clear that the New Jersey statute must dominate this controversy. . . .

The Circuit Court should be advised that the subsequent mortgagee is entitled to judgment.¹

MASURY v. ARKANSAS NATIONAL BANK.

CIRCUIT COURT OF THE UNITED STATES, E. DISTRICT ARKANSAS. 1898.

[*Reported 87 Federal Reporter, 381.*]

THIS is a bill in equity by Grace Masury against the Arkansas National Bank and others to cancel a sheriff's sale of shares in a corporation, and to declare and foreclose a lien on the stock. The cause was heard on demurrer to the bill.

WILLIAMS, District Judge.² The only questions involved are whether, under the statutes of Arkansas, a seizure of shares of the capital stock of a corporation existing under the laws of that State, by virtue of a writ of attachment, or under execution, takes precedence over a prior transfer or pledge, not transferred on the books of the corporation, nor filed for record in the office of the county clerk of the county in which the corporation transacts its business, and whether the laws of this State govern such a transfer, if made in another State. As to the last proposition, learned counsel for complainant claim that *Black v. Zacharie*, 3 How. 483, is conclusive that the laws of New York, where the transfer was made, and not the laws of Arkansas, of which State the company was a corporation, control. The question involved in that

¹ *Acc. In re Legg*, 96 Fed. 326; *De la Vergne R. M. Co. v. R. R.*, 51 La. Ann. 1733, 26 So. 455. — ED.

² Part of the opinion only is given. — ED.

suit was not that of a transfer of shares, but an assignment of the equity of redemption in stock previously assigned and delivered as a pledge. The court say :

" We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the laws of Louisiana [the domicil of the corporation], and not upon that of South Carolina [where the assignment was made]. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State."

Judge Lowell, speaking of the same subject, says :

" Whatever the general principles of international law in relation to assignments of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created." Lowell, *Stocks*, § 50 ; *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727 ; *Green v. Van Buskirk*, 7 Wall. 140.

I am therefore of the opinion that, unless the transfer of this stock is valid under the laws of Arkansas, the State which created the corporation, the laws of the State where the transfer was actually made cannot control.

IN RE QUEENSLAND MERCANTILE AND AGENCY COMPANY.

CHANCERY DIVISION. 1891.

[*Reported* [1891] 1 *Chancery Division*, 536.]

THIS was the hearing of two summonses in the winding-up in England of an Australian company, which was also being wound up in Australia.

One summons was by the Union Bank of Australia, Limited, an English company, that the English liquidator might be ordered to transfer to them the sums of New Consols and cash standing in his name, representing the proceeds of calls in his hands in respect of shares in the company being wound up, numbered 1 to 2,500 inclusively.

The other summons was by the Australasian Investment Company, that out of the sum of £24,730 12s. 2d. New Consols and any cash in his hands or in court representing money received from Scotch shareholders in the company in liquidation, the sum of £12,666 4s. 5d. might be paid to the applicants in priority over all other payments out of the said funds. This summons also asked that, if necessary, a case might be remitted to the Court of Session in Scotland, under the statute 22 & 23 Vict. c. 63, § 1, for the purpose of ascertaining the law of Scotland relative to matters of Scotch law involved.

The Queensland and Mercantile and Agency Company was registered in Brisbane, and for several years before it was wound up carried on business in Queensland. The bankers of that company were the Union Bank of Australia, who, on the 28th of June, and the 3d of September, 1866, took from the Queensland Company two debentures of £10,000 and £50,000 respectively in similar form, whereby the payment of such debentures was made a first charge on the uncalled capital made receivable in respect of shares numbered from 1 to 2,500 in the Queensland Company, upon each of which shares £50 had been paid up and £50 more remained uncalled.

In December, 1886, the company passed resolutions calling up the balance of £50 per share, payable by equal instalments in February, April, June, and August, 1887, respectively. Notice of the call was given to the shareholders, but they never had any notice of the charge effected by the said two debentures in favor of the Union Bank. On the 24th of February, 1887, a Scotch company, called the Australasian Investment Company, commenced an action in Scotland against the Queensland Company for negligence, and immediately afterwards, on the same day issued a Scotch process known as arrestment on the dependence of the action, against numerous holders of the Queensland Company's shares who were resident in Scotland, the effect of which was that the calls payable by them to the Queensland Company were arrested in their hands, and the Australasian Company (the Pursuers in the action) became secured creditors on the funds so arrested for the amounts for which they should establish their claim in the action. By the terms of the order of arrestment the sums arrested were required "to remain in the hands of the arrestees under sure fence and arrestment at the instance of the Pursuers, aye and until sufficient caution and surety be found acted in the books of Council and Session that the same shall be made forthcoming to the said Pursuers as accords of law conform to the summons in all points."

In the months of May, July, and August, 1887, judgments were recovered in England in twenty-seven actions by one Drake and others against the Queensland Company. On the 2d of September, 1887, the Union Bank commenced an action in England against the Queensland Company in respect of money due to them other than that secured by the two debentures, and on the 7th of September an order was made in all those actions for the appointment of a receiver to get in the calls from the shareholders in the Queensland Company.

On the 28th of October, 1887, an order was made in Queensland for the winding-up of the Queensland Company, and thereupon the £60,000 secured by the two debentures above mentioned became payable. On the 14th of January, 1888, a similar order was made in England. By various proceedings and orders in England and in Scotland, to which it is not necessary to refer in detail, the Australasian Company were restrained from further prosecuting their action in Scotland, but without prejudice to the security, if any, upon the amounts payable by the

Scotch shareholders in the Queensland Company in respect of the said calls which the Australasian Company had acquired by the proceedings taken by them in Scotland; and the official liquidator received from the receiver, or himself collected, and now held on separate accounts the amounts paid for calls by the Scotch and English shareholders respectively, the receipts from the Scotch shareholders being about £24,730. By proceedings in the winding-up in Queensland the amounts due from the Queensland Company to the Union Bank were ascertained at upwards of £74,000; but it was admitted that, after allowing for securities held by them, their claim was reduced in round figures to £31,000.

On the hearing of the summonses the Union Bank asked for an order upon the official liquidator to transfer to them on account of their claim the sums he has thus received in respect of the shares numbered 1 to 2,500, including those received from the Scotch shareholders. The Australasian Company claimed, on the other hand, to be first paid out of the moneys received from the Scotch shareholders, £12,666 4s. 5d., which had been found in the English winding-up to be the amount of the claim due to them. The plaintiffs in the actions of Drake and others against the Queensland Company also asserted a claim to the funds in hand against both the Union Bank and the Australasian Company, upon the ground that as against them the debentures were inoperative.

The only evidence of the law of Scotland bearing on the matters in question was contained in an affidavit made in the matter by John Blair, writer to the signet, a member of the firm in Edinburgh who were the solicitors of the Australasian Investment Company. The effect of it is stated in the judgment.¹

NORTH, J. (after stating the facts as above, and reading parts of Mr. Blair's affidavit, continued). It is not satisfactory to me to find that the only evidence in this case of the Scotch law is contained in an affidavit by Mr. Blair, the legal adviser of the Australasian Company, and that, although there is no evidence contradicting it, the Union Bank state that they will, if necessary, contend before the House of Lords that such affidavit lays down the Scotch law incorrectly. This may be open before their Lordships on appeal, but it is not open before me, for the question of Scotch law is here merely a question of fact, upon which the evidence is all one way, and the Union Bank have not asked me to give them an opportunity of going into further evidence or to send a case for the opinion of the Scotch court. By such evidence it is established that there is, by virtue of the arrestment, what is equivalent to an actual assignment of the calls in question duly intimated, and that this, by the law of Scotland, is preferable to and has priority over the assignment of the Union Bank, of which, though prior in time to the arrestment, no intimation had

¹ The tenor of the debentures and arguments of counsel are omitted. — Ed.

been given at the date when the assignment by arrestment became complete; and this is what I feel bound to decide.

It was contended on behalf of the Union Bank that the claim of the Australasian Company could only be valid as against "the sums attached," which was said to be what would remain of the calls after satisfying what was due to the Union Bank; but this is quite inconsistent with the language of the arrestment, which applies specifically to the whole sum due for calls from each of the shareholders on whom the arrestment was served. It was also said that after the assignment to the Union Bank all that the Queensland Company had left was the surplus remaining over after paying the bank, that the rest of the calls belonged to the bank, and that it was contrary to principle and authority to hold that a process of law against the debtor could affect what was the property of the creditor, the Union Bank. But in the present case I have not to deal with a mere process of law, such as a judgment or garnishee order, but with what is established as a fact to be equivalent to an actual assignment, and which on the evidence I must treat in exactly the same way as if such an assignment had been actually executed and intimated.

But the Union Bank also put their claim to priority over the Australasian Company in another way. They say that whatever the position of matters might have been if all the parties to these transactions had been domiciled in Scotland, the facts are not so; that the Queensland Company were creditors in respect of the debt due from the shareholders for calls; that this company was domiciled in Queensland, and therefore the validity of the assignment by them to the Union Bank depends upon the law of Queensland, and not on the law of the Scotch debtor's residence; that by the law of Queensland (which is admitted to agree with that of England), no notice or intimation was necessary; and that a transfer of personal or movable property, valid by the law of the owner's domicil, is valid wherever the property is situated. They rely on the principle concisely expressed in the maxim, *Mobilia sequuntur personam*, and more fully stated in numerous authorities, of which it is sufficient that I should refer to one, viz., the judgment of Lord Loughborough in *Sill v. Worswick*, 1 H. Bl. 690. He says this: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

In my view, after full consideration, it is not necessary for me to

express any opinion on this interesting and difficult question; for, assuming the principle above stated to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law, it is necessary, in order to give a charge on corporeal movables, that they should be delivered to and placed in the possession of the creditor. But, if a domiciled Scotchman resident in London gave a duly registered bill of sale of the furniture of his house, that would be a complete and effectual transfer of the property without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery. To apply this to the present case, the Queensland Company did certain acts (by commission or omission), by virtue of which certain legal rights arose in Scotland, having identically the same effect in all respects (according to the evidence before me) as if the Queensland Company had on the date of the arrestment executed an assignment of the calls in question to the Australasian Company, and such assignment had been forthwith intimated to the persons in whose hands the calls were arrested. Such an assignment would, according to the evidence, clearly have been preferred to another assignment bearing, indeed, an earlier date, but not completed by intimation; and, in my opinion, the right of those who have acquired an unexceptionable title, and have recovered the property according to the law of the country where it is found and arrested, cannot be defeated by showing that if the property had been elsewhere the title of the Union Bank might have been the preferable one. I speak of the Australasian Company as having recovered the calls, although they have, as matter of convenience, been received by the official liquidator, because they would have actually received them if the action had not been stayed, and the rights of the parties cannot be affected by the court having stayed the action, as by the order staying the action their right or security was expressly left unprejudiced. The terms of the order will require some care, in dealing with the figures; but in substance I accede to the summons of the Australasian Company, and only direct the payment of the balance of the Scotch calls to the Union Bank. There will be an order on both summonses, and the Australasian Company and Union Bank will add their costs to their respective securities. The official liquidator's costs must be retained by him out of the calls in his hands.

CARTER v. MUTUAL LIFE INSURANCE COMPANY.

SUPREME COURT OF THE HAWAIIAN ISLANDS. 1896.

[Reported 10 *Hawaiian Reports*, 559.]

FREAR, J.¹ This is an action on a policy of insurance issued by the defendant company upon the life of Henri G. McGrew for \$5,000, payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew . . . if living, if not living to his executors, administrators, or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it, — whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured prior to his decease obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands: the policy is dated September 14, 1892; it was issued to Henri G. McGrew upon his application; he retained possession of it and paid all premiums upon it; he died October 22, 1894; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands; J. O. Carter is the duly appointed administrator of his estate; all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The former decision in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based on a number of grounds therein set forth. . . .

The first point relied on is, that the court manifestly erred in construing the policy as a Hawaiian contract, whereas it appears upon its face to be a New York contract. . . . And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was in his own right, and, if so, what that interest was, or if A had died, it might be a question of construction, whether the property should then pass to A's representatives or to some one else. These questions would be decided by the law of the place of contract. But suppose the contract were construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but of A's domicile. Or, suppose A had previously assigned the property, his representatives would not take at all, — not because of an erroneous

¹ The first two paragraphs of the opinion are taken from the original opinion. Part of the opinion is omitted. — ED.

construction of the contract by the law of domicile or any other law, but because the ownership of the property had changed, — a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband. So, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern, and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid; . . . this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy, — its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured's representatives in case he survived his wife, etc. Indeed, New York law must be assumed to include private international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce, at least if that is also the place of domicile — the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that State. In considering this question, it should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits, — one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California, or New York. In our opinion, that law is the law of the place of domicile and divorce. We can only assume that the California court will take the same view. . . .

The next point is, that section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the court, the wife because she had gone to California, the policy, because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is

governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which, in the absence of proof to the contrary, would, at least after so short an absence, be presumed to continue here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The court having acquired jurisdiction under these circumstances the incidents of the divorce would follow according to the law of the place of divorce.

The motion for the rehearing is denied.

BADIN v. HEIRS OF AYME.

COURT OF CASSATION, FRANCE. 1815.

[Reported 5 Sirey Recueil Général I. 47.]

MARTHE AYME, French by origin, had left her native country to live at Avignon, then under the sovereignty of the Pope. She made at Avignon, on the 5th of July, 1784, to Marie Bouillet-Badin, a cumulative gift of all her property then owned or to be acquired, reserving the use of it during life and the sum of 200 francs at her own sole disposal. Shortly after, Marthe Ayme returned to France, and on the 11th of May, 1785, she made there in favor of her nephews a new gift of all property then owned by her, and also a will by which she created them her heirs. In the course of the same year she brought suit against Marie Bouillet-Badin for revocation of the gift of July 5, 1784, on the ground that it included after-acquired property, contrary to the French ordinance of 1731. She died June 4, 1786.

Marie Bouillet-Badin averred that the gift was valid, because made in a country where the ordinance was not in force, but only the Roman law, which permitted such gifts even outside marriage, provided the donor do not entirely despoil himself, that is, retain full power over some property. Here the entire use had been reserved for life, together with absolute power over 200 francs.

The property in question was situated in France.

The Tribunal of First Instance, the 16th Thermidor, Year 6, adjudged the gift valid. On appeal the Civil Tribunal of the Department of the Gard, 5th Frimaire, Year 8, reversed the judgment. Dame Badin brought error in Cassation.¹

¹ This statement of facts is condensed from that of the Reporter. — Ed.

THE COURT. The principle here involved is that prohibitory laws, that is, such as forbid the transfer of property, either wholly or in part or under specified circumstances, constitute statutes real which directly affect the property, and restrain the proprietor's liberty of disposal whatever be his domicil. Of this sort is Article 15 of the Ordinance of 1731; in fact, this article clearly belongs to the class of statutes real, since it forbids gifts *inter vivos* (except when made in a marriage contract) of property in possession and after acquired. The judgment therefore should annul, as it has done, the gift in litigation, since it is a cumulative disposition of property both present and future, so far as it covers property situated in France and therefore subject to the Ordinance of 1731.

Appeal rejected.

MAHLER v. SCHIRMER AND SCHLICK.

REICHS-OBERHANDELSGERICHT. 1872.

[Reported 6 *Entscheidungen des R. O. H. G.* 80.]

THE Elbe steamboat "Borussia," belonging to the shipowner Charles S. of Torgau, lay at anchor in Dresden in May, 1868, when she was attached at suit of the firm of Schirmer & Schlick of Leipzig on account of a loan; the next September execution was issued against the vessel by authority of the same court for the same firm upon a claim on a bill of exchange, but the sale of the vessel was stayed.

Against this execution the petitioner Mahler intervened. The "Borussia," as he alleged, on Michaelmas, 1865, was mortgaged to him at Torgau in the method there required by law, that is, by the minute of a notary upon the bill of exchange, for a debt of 5000 thalers.

The judge of first instance admitted the binding force of the alleged mortgage; the Court of Appeal denied its force in the Kingdom of Saxony. The R. O. H. G. agreed with the judge of first instance for the following reasons.

THE COURT. Section 10 of the Saxon Civil Code provides: "The title to movable and immovable property, as well as the right of possession, shall be decided according to the law of the situs of said property." The previous lively dispute whether in the case of movables the law of the domicil of the owner or the law of the situs of the property should prevail is settled by this section in favor of the second alternative, whilst the Prussian, Austrian, and French codes are based upon the acceptance of the first. But the place where the property is at the time of the judicial decision is not all-important for the application of section 10; both lower courts have conclusively proved this. Neither according to the letter nor to the spirit of the statute may it be held that, by judicial determination of the title to property, a conveyance which has previously been executed in accordance with the local *lex*

rei sitae at the place where the thing then was may be regarded as a mere nullity because it is not according to the law of the forum. For the universal rule (especially recognized for Saxon law by von Siebenhaar in his Commentary, Vol. 1, p. 49, note 2) is that all juristic facts are to be adjudged according to the law of the place where they occurred. Legal acts, therefore, when they are in the category of already accomplished facts in one country, are recognized as such in every other country. The situation will of course be altered if a third person acquires an independent title in the thing at the place to which it is brought later; for the determination of such a title the local law governs, according to section 10 of the Code. And if the right acquired within the country conflicts with that before acquired abroad, the local law prevails with respect to the substantive right.

The Saxon judge may therefore be in a position to subject to the claims of his local law the decision of lawsuits about movables; but the admissibility of such subjection always depends on the actual assumption that the things have come within the jurisdiction of the Saxon law. The things must be situated within Saxony. But the momentary position is not entirely decisive; there are things which are constantly changing their position without thereby losing their legal relation to the place from which they started. This is especially true of the most important instruments of transportation, ships and railroad trains. During their journeys they touch at foreign places only in passing, with the intention of returning to the place where their legal relations are situated. The recognition of this place of departure as the place that governs their legal relations seems to be enjoined by practical necessity. Without this recognition intercourse between different countries would not be practicable, and an insecurity of rights would ensue in opposition to the necessities of modern law. This doctrine is already established with regard to sea-going vessels; the same principle must however by analogy apply in substance to river boats. Vessels form (as von Goldschmidt has strikingly remarked, Handbook of Commercial Law, § 60, p. 527) as it were the immovables of commerce and are in many ways subject to the law of immovables. They have, according to this theory, in the maritime clauses of the Commercial Code, a fixed situation like real estate, a quasi-domicil, namely the home port, which constitutes the juridical centre of the outfit (Goldschmidt, *op. cit.*, note 8). From this point of view the "Borussia" had the centre of her legal relations in the kingdom of Prussia.

The boat, as has been said, lay at anchor in Dresden while passing on a longer voyage, when at suit of Schirmer & Schlick, the defendants in the intervention, she was attached, in May, 1868, by the Saxon judge. Her owner was an inhabitant of Torgau, and a Prussian subject. The complete execution, in September, 1868, was only made possible by reason of the previous attachment of the vessel in Dresden, and this legal act enforced by the defendant was probably the only thing that kept the vessel in the Saxon dominions, as it probably also required

the further stay of the owner in Dresden. The ship's papers were all issued by authority of the Prussian State. The ship belonged to that State with respect to its juridical relations. This is the more certain that according to the treaty concluded between Prussia and Saxony with reference to the navigation of the Elbe it was expressly provided that Prussian vessels, even while they were within Saxony, should still form part of the Prussian merchant-marine (Art. iv. of the Elbschiff-fahrtsakte of June 23, 1821; Ges.-Sammlung 1823, p. 95: — Section 10 of the Additionalakte of April 13, 1844; Ges.-Sammlung 1844, p. 284: — Verordnung of February 16, 1866, as to the form of the manifest, etc.; Ges.-Sammlung, 1866, p. 49, at the words, "Each vessel must be plainly marked with the name of the place where she belongs," etc.) — a relation that according to section 11 of said Additionalakte is not lost by a change of situation of the vessel for the time being, but only when upon withdrawal of the ship's papers issued by one State the vessel joins the marine of the other. The acts furnish no support for the contention that a change has taken place in the registry of the "Borussia." It cannot be supposed that the vessel at the time of the execution had its location in Saxony in the sense of section 10 of the Civil Code. The situs of the legal relations of the vessel at the time of the attachment was likewise not in Dresden; and that process was therefore not calculated to subject the vessel to the exclusive jurisdiction of the Saxon law. This was recognized by von Siebenhaar (*op. cit.*, p. 49); in accordance with the constant practice he clearly holds that in the case of movables the law that governs is not under all circumstances the law of the place where they happen to be for the moment, but rather that of the place where, according to the intention of the owner, they are destined to remain; a case which arises especially when goods merely pass through Saxony in the post or on a railway, or when foreigners while on a journey bring goods with them into Saxony. The situs of all legal relations of the vessel "Borussia" was and continued to be in Prussia, even though its owner had not yet returned home. Therefore by reason of section 10, so much the less can the validity of the mortgage claimed by the intervenor be denied, because even from the standpoint of the Saxon law no real conflict is presented between the successive interests in the vessel.

REYHER & SCHINTZ *v.* GAUTREAU ET COMPAGNIE.

COURT OF APPEAL OF BRUSSELS. 1876.

[*Reported Pasirisie Belge*, 1877, 2, 12.]

GAUTREAU & CIE. of Valparaiso obtained from the President of the Tribunal of Commerce of Antwerp, as creditors of the California Co. of Chili, authority to attach in the Port of Antwerp a cargo of nitrate of soda which had been laden in Peru on board the ship "Pride of Devon." Reyher & Schintz of Liverpool had bought at the Liverpool Exchange part of the cargo; and they brought suit in the Civil Tribunal of Antwerp to annul the attachment.

On July 14, 1876, the Tribunal gave judgment¹ sustaining the attachment. Appeal.

THE COURT. This court is not dealing with the order of the President of the Tribunal of Commerce of Antwerp, which authorized the attachment of the cargo of the "Pride of Devon," but with the petition for annulling said attachment, which has been effected in accordance with said order. . . .

Movables found on Belgian territory are governed, when considered individually, by Belgian law. The possessor in good faith, especially, is protected against a mere replevin suit by articles 2279 and 2280 of the Civil Code. This is exactly the case of the appellants Reyher & Schintz. They prove that they bought the cargo of the "Pride of Devon" on May 22, 1876, of Cox Brothers, brokers, at Liverpool, dealing in their own name, and that they regularly paid the purchase-money. As indorsees of the bill of lading (and to that extent of the goods) they sent it to Messrs. Kniewitz-Bleeckx & Cie., of Antwerp, to whom the goods were delivered as fast as landed, after the attachment. The appellees cite no foreign law which would be violated by the sale of May 22. The allegation (denied by the appellants) that the indorsement in blank of a bill of lading would not effect a transfer of title of a cargo according to the law of Peru is not in point, since the appellants bought at Liverpool, and it is clear that by English law the indorsement in blank passes title. In any case, in view of the sale of May 22, the indorsement of the bill of lading is no more than a delivery order given to the master, who held the merchandise for the appellants.

It results from what has been said that even if the law of Peru considers as a kind of theft the violation of legal attachment to which, it appears, the cargo of the "Pride of Devon" was subject at the port of embarkation, article 2280 of the Civil Code would relieve the appellants from the suit for restoration of the merchandise, since the appellees do not offer to reimburse the price paid by the appellants. Under these circumstances, the attachment cannot be maintained.

Judgment reversed.

¹ This judgment, and part of the judgment of the Court of Appeal, are omitted. — Ed.

COÛTEAUX FRÈRES v. VARTHALITI.

SPANISH CONSULAR COURT, CONSTANTINOPLE. 1892.

[Reported 20 *Clunet*, 447.]

VARTHALITI, a Spanish subject, had pledged various valuable securities to secure advances to him from the banking-house of Coûteaux Frères, of Belgian nationality. Varthaliti having been declared bankrupt, certain creditors attacked the validity of the pledge in the Spanish Consular Court, sitting as a bankruptcy court, on the ground that it was null as to them, not having been executed in accordance with Spanish law, the law of the court. They petitioned the court to declare that the securities were deposited in the bank in the course of business, and to bring them into the fund for the general creditors.

THE COURT. The principle *actus regit locum*, which the Advocate Galli invokes as the complement of the aphorism *locus regit actum*, is not to be admitted. We cannot apply to the present case article 1865 of the Civil Code;¹ to do so would be to establish a rule as false as prejudicial. If it were established, a Spanish subject knowing his own law and acting in bad faith, might apply on the eve of his failure at the establishment of a subject of another country, at the place where they both reside, for a loan or a credit for his own personal use, pledging as security valuable effects: being sure that at a certain time these valuable effects, by virtue of the article in question, would fall into the mass of his assets, for the benefit of his general creditors and to the obvious prejudice of the new creditor. Every subject of each nation could as well act in the same way, profiting in a foreign country by the Code under which he should have acted if he had been in his own country. If this doctrine were once admitted in a place like Constantinople, where commerce is carried on by subjects of every nation under the sun, the application of distinct laws to cases like this in question would produce such confusion that business would be paralyzed by the annulling of contracts.

As a result of facts of this sort, and by mutual agreement of nations which had once suffered from them, private international law came into existence, inspired by the necessity of admitting the effect of foreign laws. This law has the character of customary law, and its principles are distinguished by a number of statutes, namely: the statute personal, which affects persons; the statute real, which governs things; and the statute formal, which deals with forms. The statute formal is based on the principal *locus regit actum*, and in no manner on the principle *actus regit locum* which Advocate Galli would have applied. Article 11 of the Civil Code, invoked by Advocates G. Coûteaux and E. Degand in their arguments, to the effect that "forms and solemn-

¹ "A mortgage has no effect against third persons unless its execution is established by a public act."

ties of contracts, wills, and other public acts are governed by the laws of the countries where they are executed," implicitly deals with the statute formal, and the only principle applicable to the present case is therefore *locus regit actum*.

The Ottoman law of Medjele in force in this empire provides that "pledge is constituted by the simple declaration of consent of parties followed by delivery of possession of the thing pledged." Varthaliti acknowledged having delivered to Côteaux Frères the valuable effects in question in pledge, as security for debts contracted with them. The aforesaid law of Medjele furnishes a rule for transactions of this kind, which are entered into daily by banks and money-lenders established here.

SECTION IV.

TRUSTS.

LORD CRANSTOWN v. JOHNSTON.

CHANCERY. 1796.

[Reported 3 Vesey, 170.]

THE bill was filed upon the following case. After various dealings between the plaintiff and defendant previous to the year 1788, which produced a bill by the defendant, they agreed to an arbitration. Upon the 8th of July, 1789, an award was made, that Lord Cranstown should, upon the 1st of March, 1790, pay at Lloyd's Coffee House £2,521, 10s. 9d. At the time of the award the plaintiff was abroad, and he did not comply with it. He was entitled to the reversion upon the death of his mother of a plantation in the island of St. Christopher, the average product of which was £5,000 a year; and during the life of his mother he was entitled to an annuity of £300, charged upon that plantation. The defendant, immediately after the expiration of the time limited by the award, procured an agent to institute proceedings in the island against the plaintiff in his absence; and thereby obtained payment of the said annuity since the 25th of December, 1789. The plaintiff returned to England in 1791, and frequently offered to pay the defendant, and requested him to come to an account: but he refused to refund; and after the expiration of the time commenced an action in the Court of King's Bench and Common Pleas in the island, obtained judgment, and caused an execution to be taken out; and thereby the Deputy Provost Marshal of the island seized and put up to public sale the said rent-charge and reversion; and the defendant became the purchaser of both for £2,000 currency:

and a bill of sale and conveyance was executed to him by the said Deputy Provost Marshal, by means of which he was become entitled to his own use; and £2,000 currency being of the value of £1,200 sterling, he claims to have a personal demand for the remainder of the sum awarded.¹

SIR RICHARD PEPPER ARDEN, MASTER OF THE ROLLS. This relief is sought upon the terms of paying all such sums of money as were due to the defendant at the time of the judgment, and the costs and expenses he was put to in procuring and carrying into effect that judgment; and I suppose, though it is not expressly stated, upon payment of all such incumbrances affecting the same estates as the defendant may have become entitled to. From the moment the case was opened, and after reading the evidence, there can be no question except as to the terms of the relief; for I confess, I never saw a case in which the relief sought was more clear; and I must forget the name of the court in which I sit if I refuse to grant it. . . . Such a picture of a sale under a judgment so insisted upon is such as I should not have thought could have been exhibited in a court of justice with a serious intention, supposing that any law of any country should be perverted to such a purpose.

It is material to see what was the law to which the defendant applied for enforcing payment. He could not with effect in this country; but he found out this interest in that island: where there was an act of assembly authorizing any creditor to proceed against an absent debtor by writ of summons, and in case the defendant shall secrete and conceal himself, so that the Provost Marshal or other person summoning cannot find him, then one summons and a copy of the declaration left at the last usual place of abode, or upon the freehold of the defendant, and another nailed up at the court-house door, shall be good and effectual. He thought fit to proceed on this law; and I must now suppose he had a right so to do, though the plaintiff, I think, was very ill advised for not trying whether any relief could be given in the island: a summons left upon the freehold, as it is called, of a person who had no freehold in possession; who had no tenant, upon whom this constructive notice could be served; and the creditor here knowing this avails himself of this law, which I do not mean to quarrel with: but neither that law nor any law in His Majesty's dominions could be, I hope, carried to the extent of authorizing a sale without either actual or constructive notice.

It is perfectly clear, the plaintiff had no conception that his estate was to be sold. He knew the defendant had a judgment, and thought it would be a security to him; and in the letter of the 4th of October hopes he will be content with that. . . .

Upon the whole it comes to this: that by a proceeding in the island an absentee's estate may be brought to sale, and for whatever in-

¹ The statement of evidence, arguments of counsel, and part of the opinion are omitted. — Ed.

terest he has, without any particular, upon which they are to bid: the question is, whether any court will permit the transaction to avail to that extent. It is said, this court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly, that it is strange for this court to say, it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse, and wishes to avail himself of it; the question is, whether an English court will permit such a use to be made of the law of that island or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the scale could be holden. It was not much litigated that the courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this court cannot act upon the land directly, but acts upon the conscience of the person living here. *Archer v. Preston*, Lord Arglasse *v. Muschamp*, Lord Kildare *v. Eustace*, 1 Eq. Abr. 133; 1 Vern. 75, 135, 419. Those cases clearly show, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England. Lord Hardwicke lays down the same doctrine, 3 Atk. 589. Therefore without affecting the jurisdiction of the courts there, or questioning the regularity of the proceedings as in a court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice, which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this court will not permit him to avail himself of the law of any other country to do what would be gross injustice.

It is said, what if the sale had been to a third person? I am glad I have not to determine that. A third person might have a great deal more to say than this defendant can. He might say the law of the island authorizes a lottery, and having bid he has a right to retain it. But this defendant has no such right except for the purpose of paying himself the debt. . . .

Therefore on payment of the money awarded, and such sums as the defendant has paid in the island, with interest at 5 per cent, he

must reconvey, subject to other incumbrances. Take an account of what is due for principal and interest, and also of what is due upon the payments of the annuity with interest, and reserve the costs.

EX PARTE POLLARD. IN RE COURTNEY.

CHANCERY. 1840.

[*Reported Montague & Chitty's Reports*, 239.]

LORD COTTENHAM, L. C.¹ The short result of the facts of this case, as stated in the special case by which I am bound, is, that the bankrupts were absolutely entitled, as part of their partnership property, to some land in Scotland, the legal title being in George Courtney, one of the bankrupts; that the firm, being indebted to the petitioner, George Pollard, in order to induce him to give them further credit, deposited with him the disposition and instrument of seisin, being the title deeds of such lands, and signed and gave to him a memorandum in writing, dated the 13th of March, 1832, declaring that they thereby gave to Pollard a lien upon the land for the general balance of all or any monies that then were or might thereafter become due to him from them to the extent of £2,000, and they agreed that he should stand in the nature of an equitable mortgagee thereof; and, on demand, they further agreed to make, do, and perfect all such acts for the better securing to him of any such monies as aforesaid; that Pollard, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th December, 1832, at which time he was a creditor for the sum of £1,927 4s. 6d. The only other facts stated in the special case, material to the present question, is, that by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit of the title deeds, or by the written memorandum. The question is, whether Pollard is, under the circumstances, entitled to have his debt paid out of that part of the estate of the bankrupts which consists of their property in Scotland, in preference to their general creditors; or, in other words, the assignees being liable to all the equities to which the bankrupt was subject, whether such a deposit and agreement, made and entered into in this country, gave to the creditor such a title as against his debtor to have the agreement performed and the debt paid out of the property in Scotland, the subject of such deposit and agreement. The special case also finds that the deposit and agreement does not by the law of Scotland create any lien or equitable mortgage upon the estate. By this statement of the law of Scotland, which, sitting here, I must consider

¹ The opinion only is given. — Ed.

as a fact, I am bound, but so far only as the statement goes, and that does not find anything contrary to the well-known rule, that obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland, but that by the law of Scotland no lien or equitable mortgage was created by the deposit and agreement; by which must be understood that the law of Scotland does not permit such deposit and agreement to operate *in rem*, and not that they may not give a title to relief *in personam*. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*; but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The observations of Lord Hardwicke in *Penn v. Baltimore*, 1 Ves. 454, are founded upon this distinction. In *Lord Cranstown v. Johnston*, 3 Ves. 182, Lord Alvanley, upon principles of equity familiar in this country, set aside a sale in the Island of St. Christopher, by the laws of which country the sale was perfectly good, no such principles of equity being recognized by the courts there, saying, "With regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England." In *Scott v. Nesbitt*, 14 Ves. 442, Lord Eldon, in the face of the master's report finding that there was no law or usage in Jamaica for a lien by a consignee in respect of supplies furnished to the estate, directed consignees to be allowed such expenditure in their account with encumbrancers. Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies and elsewhere out of the jurisdiction of this court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the courts of this country from giving such effect to the transactions between the parties as it would have given if the land had been in England? If the contract had been to sell the lands a specific performance would have been decreed; and why is all relief to be

refused because the contract is to sell, subject to a condition for redemption? The substance of the agreement is to charge the debt upon the estates, and to do and perfect all such acts as may be necessary for the purpose; and if the court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will give effect to this equity by paying out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it, which is what the creditor asks. The special case finds, that the deeds were deposited and the agreement signed by the bankrupts in order to induce the creditor to give them further credit, and that he, relying upon the security of the hereditaments so charged to him, continued to give credit to the bankrupts to the time of their bankruptcy. The transaction is in no respect impeached, and there is no competition with any person having obtained a title under the law of Scotland. The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affected the bankrupts. To deny to the creditor the benefit of this security would be an injustice which, if unavoidable, would be much to be regretted. In giving effect to it I act upon the well-known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order that to be done which the parties may by that law lawfully perform.

I reverse the judgment of the Court of Review, giving to the creditor payment of his debt out of the proceeds of the estate.

Judgment of the Court of Review reversed.

ACKER v. PRIEST.

SUPREME COURT OF IOWA. 1894.

[Reported 92 Iowa, 610.]

DEEMER, J.¹ The plaintiffs in the equity suit are the heirs at law of Elizabeth Priest, deceased, and the defendant, Stephen C. Priest, is their father. Mrs. Priest was a daughter of one Joseph Abrams. Joseph Abrams had one son and three daughters, besides Mrs. Priest. In the month of July, 1884, Abrams, who was then living in the State of Kansas, concluded to make a partial distribution and advancement of his property to his children. He was then the owner of two farms in Kansas, one of which was known as his "Home Farm," and the other was occupied by defendant Priest and his family. Thomas W. King, another son-in-law, owned and occupied another and a third farm in the same county as the other two. In order to carry out his purpose, and make an equal distribution of property to his daughters, Abrams

¹ Part of the opinion only is given. — Ed.

made arrangements with King to exchange the home farm, valued at \$8,000, for the King place, at the agreed price of \$4,000. Prior thereto, however, Abrams had had a conversation with defendant Priest, in which he told him he intended to give him a farm. After making arrangements with King, Abrams informed defendant that he had an opportunity to trade the home farm for King's land, and directed defendant to go and look at the farm, and if it suited him he (Abrams) would make the exchange. Defendant, after examining the place, was pleased with it, and so informed Abrams, and Abrams made the contemplated exchange. Abrams deeded the home farm to King, and King, by direction of Abrams, and with the knowledge, direction, and consent of the deceased, Mrs. Priest, made a deed to his place to the defendant Priest. This last deed was a warranty deed, in the usual form, and for the expressed consideration of \$4,000. Shortly after the making of these deeds, the defendant moved onto the King farm, and used and occupied it for a year or more, when he sold it, and with the proceeds purchased a farm in Cass County, Iowa, from one Isabella Goodale. The deed to the Cass County land was taken in the name of the defendant with the knowledge and consent of his wife. Defendant and his wife immediately took possession of the Cass County land, and occupied and used the same until the death of his wife, in April, 1888. After the death of the wife, and in May, 1891, the defendant sold the land in Cass County, and at the time of the commencement of this suit was in possession of a large part of the proceeds of the sale. Plaintiffs claim that the defendant at all times had the title to the Kansas land and to the land in Cass County in trust for his wife, Elizabeth V. Priest, and that they, as her heirs at law, are entitled to have a trust impressed upon the funds now in the hands of the defendant, arising out of the sale of the Cass County land. Defendant Isaac Dickerson was made a party to the suit because of his having possession of some of the funds arising from the sale of the land in this State. . . .

Plaintiffs do not — nor, indeed, could they, under the statutes of either Kansas or of this State — claim an express trust in the land, or the proceeds thereof. Their claim is that from the transactions between the parties, as proved, there arose an implied, a resulting, or a constructive trust, which the law will recognize and enforce. We turn then to the evidence, and find that while it was the intention of Abrams to make a partial distribution of his estate among his heirs, yet it did not appear to him to be important to whom he made the deeds, — whether to his daughters, in their own names, or to their husbands. The deed to the home farm was made to King, the husband of one of his daughters, and the deed to the King farm was made direct to defendant Priest. Abrams had previously spoken to defendant about giving him a farm, and while the deed was, no doubt, made so as to place all his children on an equality, it is quite evident to us that it was wholly immaterial to him to whom the deed should be made. Before having the deed made to defendant, Abrams spoke to his daughter, Mrs.

Priest, about how the deed should be made, and "she said to make it to her husband; it was all the same." Again, Abrams testifies, "My daughter gave no reason [for making the deed to her husband], except that it would be all right, recognizing him as her husband." Even if Abrams intended the deed to be for the benefit of Mrs. Priest and her children, as he says, he did not so state to defendant, and defendant had no knowledge but that he was to take the beneficial as well as the legal estate. Abrams directed King to make the deed to defendant, and King had no conversation whatever with defendant.

Applying these facts to the statutes of Kansas, before quoted, with reference to the creation of trusts,¹ and it is clear that defendant took an absolute title to the land deeded him by King, unincumbered with any trust. It is contended, however, that the laws of Kansas have no application to this case, that the statutes above quoted relate simply to the remedy, and that the *lex fori* governs. Without deciding this question, so far as it relates to the statute of frauds, for it is not necessary to a determination of the case, and passing it with the single remark that where the statute relates simply to the remedy, and does not make the parol contract void, as is the case with the statute in question, there is much force in appellants' position, we are clearly of the opinion, however, that the other statutes with reference to the creation of trust estates are binding, for they go to the validity and operation of the contract, and of the alleged trust in the land. It is familiar doctrine that the law of the place where the contract is made is to govern as to its nature, validity, obligation, and interpretation, and the law of the forum as to the remedy. *Bank v. Donnally*, 8 Pet. 316; *Scudder v. Bank*, 91 U. S. 406; *Burchard v. Dunbar*, 82 Ill. 450. It is also everywhere acknowledged that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivan*, 10 Wheat. 196. And a title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. *Bentley v. Whittemore*, 18 N. J. Eq. 373; *Hosford v. Nichols*, 1 Paige, 220; *Williams v. Maus*, 6 Watts, 278; *Wills v. Cowper*, 2 Ohio, 124.

If we are correct in our premises, it necessarily follows, as a conclusion, that under the laws of Kansas there was no trust created by law in the Kansas land, even if it be said that Mrs. Priest furnished the consideration paid for the land, because there was no agreement on the part of the defendant that he should hold the title in trust for his wife.²

¹ Gen. St. Kan. 1868, c. 114, § 6. When a conveyance for a valuable consideration is made to one person, and the consideration thereof paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections. — ED.

² The court further held that apart from the statutes of Kansas there was no trust. *Acc. Depas v. Mayo*, 11 Mo. 314; *Penfield v. Tower*, 1 N. D. 216. — ED.

PURDOM v. PAVEY.

SUPREME COURT OF CANADA. 1896.

[Reported 26 Canada, 412.]

THIS action was brought by Pavey & Co., creditors of one Ebenezer Davidson. The said Davidson had made a general assignment for the benefit of his creditors; the assets were insufficient to pay the debts, and a balance was due these plaintiffs. Afterwards Davidson became entitled to land in Oregon; he conveyed this land to his father, who gave to Purdom a mortgage on the land equal to the amount of the purchase-money named in the deed. The plaintiffs alleged that Purdom took said mortgage as a trustee for Davidson, in pursuance of a fraudulent scheme to defraud plaintiffs and other creditors of Davidson; and prayed that Purdom should be declared a trustee for Davidson, and that the money due on the mortgage note should be ordered paid into court for the benefit of the plaintiffs. The defendants demurred. From a judgment of the Court of Appeal of the Province of Ontario, overruling the demurrer, the defendants appealed to this court.¹

STRONG, C. J. So far as the lands are concerned, the validity or invalidity of this transaction must depend on the *lex rei sitæ*, — the law of the State of Oregon, — and there is no allegation that according to that law a constructive trust by operation of law would arise by reason of the intent to hinder and delay creditors, or that even an express trust must necessarily enure to the benefit of or be available for the satisfaction of creditors. . . .

Then whether the allegation of a "trust" of the purchase-money secured by the mortgage which the plaintiffs allege is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitæ*, and from this alone it follows that the forum of the situs is the proper forum.

In this last aspect of the case, *Re Hawthorne*, *Graham v. Massey*, 23 Ch. Div. 743, and *Norris v. Chambres*, 29 Beav. 246, appear to me to be authorities.

Appeal allowed with costs.

¹ This short statement is substituted for that of the Reporter. Part of the opinion only is given. — Ed.

SIEBBERAS v. DE GERONINO.

COURT OF CASSATION, PALERMO. 1894.

[*Reported Journal du Palais*, 1895, IV. 28.]

THE COURT. The Court of Appeal regards as nullified the trust for the Italian family Siebberas of property in Great Britain, by virtue of the repealing law of 1818, of Article 889 of the Italian Civil Code, and of Article 24 of the Temporary Law of November 30, 1865. It permits the application of the Italian law to this property. Its judgment is clearly erroneous. Every sovereignty which exists in the great family of nations is essentially autonomous and independent, and the right of each is limited by the equal right of the others. This sovereignty is shown, first, in dealings between citizens who are subject to the same sovereign. It is shown in a second aspect in dealings with citizens who are subject to another sovereign; under this second aspect science considers every sovereignty as an international person capable of rights and duties. There is no doubt but that by reason of its autonomy every sovereignty considered under the first aspect governs for itself its organization, its administration, and the provisions intended to protect the interests of the people and of the country; laws being only the expression of the conscience of the people and of the needs of the nation, and requiring to be in conformity with the customs, the traditions, the degree of civilization, and the racial, physical, and moral constitution of the people. On the other hand, laws should be the necessary and progressive development of the civilization and needs of the people, in order to be found in accordance with them and to grow with their development. It follows that laws, because of the reasons which have led to their adoption, can have effect only in the territory ruled by the sovereign which has promulgated them.

These principles, sound as they are for laws in general, are particularly so for those which concern the internal public law and the social organization, among which we must place those which authorize or forbid the creation of trusts. They are essentially territorial in character, and have to do only with citizens who are within the territory of the sovereign and with property situated within the same territory. The Court of Appeal, therefore, was wrong in holding that trusts established over property in a foreign country are null for the sole reason that the defendant is an Italian citizen. The Italian law has dissolved trusts, entails, and other settlements in perpetuity established according to previous law; but only those which existed within the kingdom, and not those which, established in another territory, are subject to another autonomous and independent sovereign. It is even more false to suppose, as the court appears to have done, and as the defendants in error continually do, that the trusts in this case should be considered subjectively null by reason of the provisions of our law, and as objectively

valid because at Malta, where the property is situated, they are authorized. A right cannot be at once valid and null; and if an Italian court attributed to Italians the absolute title in property, and yet held the property subject to a trust in the country where it is situated, what could be the effect of such a decision? It could not be executed in the country of situs, and would consequently be a mere academic opinion, deprived of juridical and practical value.

These principles are not opposed to Article 8 of the preliminary provisions of the Italian Civil Code; the judgment appealed from violates the letter and spirit of it. This article concerns itself with the Italian sovereignty considered as an international person; it is face to face with the ancient doctrine, according to which foreigners did not participate in the benefit of the law and were considered enemies: *adversus hostem aeterna auctoritas esto*. This system had been limited by the principles of reciprocity and common utility; but these limitations no longer correspond to the progress of jurisprudence, and the principle was finally adopted that a private right belongs to the individual as an individual. The Italian sovereignty, as a result, not only admits foreigners to the enjoyment of such civil rights as belong to citizens, but even goes so far as to permit them to invoke the law of their own country to settle successions; the statute personal had previously regulated only the succession to movables, and the succession to immovables was regulated by the statute real. The Italian law has come to look upon succession as an emanation of the family, as an *universitas juris*, continuing the person of the deceased. This provision shows that the Italian legislature has intended to follow the progress of private international law; and has considered that, according to the *jus gentium*, it is not contrary to the exercise of an autonomous and independent sovereignty to admit within a territory the application of a foreign law, if this application is based upon an international duty, a reason of comity, and the mutual utility of nations. It is to be noted that this bold but eminently liberal principle is applicable only to foreigners. Italian citizens are subject to it neither as to their property situated in Italy, which is governed by the provisions of the Civil Code in relation to successions, nor as to their property situated abroad, because the Italian sovereignty cannot impose its authority upon another autonomous and independent sovereignty which is bound to enforce its own laws. So much is clear, however principle and authority may differ about the sense of Article 8. We must also remember that a literal interpretation is illogical; a provision should be interpreted according to its spirit, and Article 8 never meant to provide for imposing its application upon foreign sovereignties.

It follows that trusts established in a foreign country are valid, even if they are for the benefit of Italian citizens, if they are authorized by the law of their situs. The Italian law did not mean to extend the scope of a mere legislative provision so as to cover any principle of international law; it has conformed to the progress of international law

on the subject of the jurisdiction of foreign law, and has admitted this jurisdiction in all cases where it seemed necessary because of the nature of the rights in question; it has shown itself generous and liberal, in order to give a laudable example, and to invite foreign sovereignties to adopt the same rule.

Finally, in spite of the development of international law, it is not the duty of a sovereignty to abdicate its inherent right to the preservation of its constitution, to its independence, to the maintenance of public order, and to all that *ad statum rei publicæ spectat*; so that in every case the application of a foreign law should yield, if it would have the result of derogating from the public laws of the kingdom, and from those which concern public order and public morals. Now the abolition of trusts in Italy is due either to political reasons or to the economic principle that the conveyance of property should be free in the interest of the development of the general wealth of the nation; so that the abolition of trusts is due to motives of public order. The English law, which authorizes trusts, would therefore have no effect upon immovables situated in Italian territory. But reciprocally the Italian law cannot have the effect of invalidating trusts created in England, even though the trust estate belongs to Italian citizens, and though succession is an indivisible unit.

Judgment of the Court of Appeal quashed.

FOWLER'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1889.

[Reported 125 Pennsylvania, 388.]

PAXSON, C. J.¹ By the terms of this deed of trust the trustee is required to "pay over the income and dividends on said bonds to Marie Washburne Fowler (appellant). . . . And should the said Marie Washburne Fowler die, the said trust herein declared shall inure to the benefit of her heirs; but if she have no children the same shall revert to my estate." There was a further direction to add fifty dollars per year out of the income to the principal. It also appeared that since the execution of this paper the said Marie has given birth to a child, who is now living, and that the settler or donor, Elihu B. Washburne, died without having in any manner exercised the power of revocation reserved in the deed of trust. The question is whether the said Marie W. Fowler is entitled to the corpus of the trust estate, consisting only of corporation bonds, freed and discharged from the trust. The court below decided that she was not, and in this we see no error. . . .

Nor do we think the direction to accumulate is invalid under the act

¹ Part of the opinion only is given. — Ed.

of 1853.¹ The act does not apply. The settler was a citizen of Illinois and died there; the deed of trust was made there; the securities are those of foreign corporations, and Mrs. Fowler is a citizen of Colorado. I do not understand it to be denied that the trust is valid by the law of the State where it was made and of the State where it is enjoyed; and the mere fact that the trustee happens to be a Pennsylvania corporation cannot invalidate the trust. The act of 1853 was only intended to apply to our own citizens, and a trust intended to take effect beyond our own territory cannot be affected by it. Authorities upon this point are not abundant; at least they have been sparingly cited. We may refer, however, to *Attorney-General v. Stewart*, 2 Mer. 161; *Curtis v. Hutton*, 14 Ves. 537; *Hill on Trustees*, 457; *Draper v. College*, 57 How. Pr. 269; *Chamberlain v. Chamberlain*, 43 N. Y. 433; *Crum v. Bliss*, 47 Conn. 592. The case is clear upon principle.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

FIRST NATIONAL BANK v. NATIONAL BROADWAY BANK.

COURT OF APPEALS, NEW YORK. 1898.

[Reported 156 *New York*, 459.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 26, 1897, affirming a judgment in favor of the defendants, entered upon a decision of the court on trial at Special Term dismissing the complaint upon the merits.

The plaintiff commenced this action to compel the Broadway Bank to transfer to its name certain shares of capital stock, issued to and standing in the name of "Philo P. Hotchkiss, trustee." The defendant bank denied the plaintiff's ownership, and set up the claim of title made thereto by Seth M. Tuttle, as alleged trustee of the shares, in succession to Hotchkiss. Tuttle was subsequently brought into the action and made a party defendant, upon his application, in order to prosecute his claim of ownership.

The general history of the trust is, that in 1857 William H. Imlay, of Hartford, Connecticut, deeded certain Michigan lands to Chester Adams, of the same place, as trustee. By the terms of the trust he was

¹ Act of April 18, 1853, Pa. P. L. 503. "No person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest, or profits thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator." — Ed.

to sell the lands and to invest the net proceeds in good bank stocks in his own name as trustee, with power to sell such stocks and to reinvest in other bank stocks. He was to pay the net income equally to Imlay's three unmarried daughters, for their sole and separate use, etc. The issue of any daughter was to take in fee the share held in trust for the mother, upon her death, and upon the death of one or more of the daughters, without issue surviving, the trust share or shares were to vest in the survivors or survivor. Adams, the trustee, died subsequently, leaving a will, wherein he appointed one Bartholomew as his successor in the trust, pursuant to a power to that effect contained in the trust deed. Subsequently, Bartholomew resigned as trustee, and Hotchkiss was, by an order of the Probate Court of Hartford, Connecticut, appointed trustee in succession. At the time of his appointment, Alice, one of Imlay's daughters, had died, without issue, and her one third share in the trust had vested in her two surviving sisters, Isabel and Georgiana. Isabel had also died, but left issue surviving, to whom her portion of the trust estate was paid. Georgiana married Hotchkiss and has two daughters. When Hotchkiss was substituted as trustee, under the deed of trust, the defendant Broadway Bank transferred the stock in question into his name, upon receiving the order mentioned, which referred to the trust deed. Some time after his appointment, Hotchkiss, who held himself out as manager of "Hotchkiss & Co.," presented a note for \$12,000 of that firm; which the plaintiff discounted upon the pledge of collateral securities, which included the stock in question and which were taken up, by means of the proceeds of the discounted note, from the Home Insurance Company, by which company the collaterals had been held to secure a former note of Hotchkiss & Co. The plaintiff received at the time a writing signed by Georgiana Hotchkiss, which authorized her husband to borrow on the "stocks standing in his name as trustee for my benefit and owned by me." Subsequently, upon default in payment of the note, the plaintiff, pursuant to the terms of the stock note discounted by it, sold the stocks at public auction and purchased them thereat. Upon requesting of the defendant bank a transfer of the stock and the issuance of a new certificate, the request was refused, and thereupon this action was instituted. Hotchkiss, having been convicted of grand larceny and sent to prison, was removed as trustee upon the application of Alice Richards, a daughter of Georgiana Hotchkiss, the beneficiary of the deed of trust, and Tuttle was appointed trustee in his stead by an order of the Supreme Court in this State. The concern of Hotchkiss & Co., whose note was discounted by the plaintiff, appears to have consisted only of Georgiana I. Hotchkiss, the business being managed by Philo P. Hotchkiss.¹

GRAY, J. Upon these facts, which are undisputed, the courts below have held that Tuttle was entitled to the possession and transfer of the stock and to the accrued dividends thereon. The conclusion as to the title to the property was reached upon the theory that, as the plaintiff

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

received the stock with constructive notice that it was the subject of a trust, no title was acquired thereto which it could enforce; for the pledge was contrary to the terms of the trust. I think that, so far, we should agree in the decision of the learned justices below. . . .

But I do not think we should affirm the judgment below, in so far as it denies the plaintiff's claim upon the life interest of Georgiana Hotchkiss in the dividends accumulated and to be declared upon the stock. The learned justices below have denied the claim upon the ground that her interest, as beneficiary of the trust, was inalienable under the Revised Statutes, 1 R. S. 729, § 63. That would be perfectly true, if the trust could be regarded as governed by the laws of this State; but I am unable to so regard it. The trust was created in Connecticut, by a resident of that State, in favor of his children there. Adams, the trustee named in the deed of trust, was domiciled in Connecticut, and by his will, probated there, he appointed his successor in the trust as directed by the deed. Hotchkiss was appointed trustee, in further succession, by an order of a court of that State. The transaction of loan by the plaintiff, itself, was in New Jersey. Under these circumstances, I do not see how the questions relating to the interests of the beneficiary in the trust are to be dealt with according to the provisions of our statutes. What the law of the State of Connecticut may be concerning them, as affected by any legislative enactments, we are not informed by the proofs in the case. Section 63 of our Revised Statutes, 1 R. S. 730, effected a change in the common-law rule, which permitted the alienation of their interests by *cestuis que trustent*, and, in the absence of proof upon the subject, we may not indulge in the presumption that the prohibitory provisions of our statutes have been enacted in Connecticut. *Leonard v. Navigation Co.*, 84 N. Y. 48; *Vanderpoel v. Gorman*, 140 N. Y. 563. It is to be presumed that the common-law rules, in equity, still obtain there. Under the common law, a wife had complete capacity to dispose of her separate estate, and, if she was the beneficiary of a trust, she was capable of charging her equitable interest, to the extent that it was not inconsistent with the terms of the trust instrument. *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34-37; *Yale v. Dederer*, 18 N. Y. 265; *Dyett v. Trust Co.*, 140 N. Y. 54-65. By this deed of trust, the settlor's only apparent intention, as to his daughters' enjoyment and disposition of their interests, is that they should have the sole and separate use, free from their husbands' control or interference. When the plaintiff made the loan of money upon the note of Hotchkiss & Co., it was upon a written authorization of Georgiana Hotchkiss to her husband that he might "borrow" on certain named stocks "standing in his name as trustee for my benefit and owned by me." She was the person dealing under the firm name of Hotchkiss & Co., and had filed her certificate to that effect, as required by the laws of the State. Thus, we have a transaction entered into by the plaintiff, presumably, in reliance upon the representations of Georgiana, the beneficiary, and for the benefit of a business concern, which was legally hers. I think she is estopped by

her acts from setting up any claim to the income upon the stock, received and which may be hereafter, during her life, received by way of dividends, by the trustee. If this were not so, then the court would be aiding her in the perpetration of a fraud upon the plaintiff. That the writing signed by her, and upon which the plaintiff's officers acted in dealing with Hotchkiss, was a disposition, or pledge, by his wife and beneficiary, of her separate interest in the trust, I entertain no doubt, and to hold otherwise would be highly inequitable. I am not without some hesitation upon this phase of the case; because I am mindful of the policy of the State, as declared in the enactment of a statutory provision, so beneficent and protective in its character as section 68; but I cannot regard this case as one which comes within the sphere of any State policy. I look upon the question as simply one of a trust created in, and governed by the laws of, a foreign State, as presumed, if not proved, and nothing appears to prevent our giving effect to the act of Georgiana Hotchkiss, the beneficiary, in disposing as she did of her interest. The conclusion I reach, therefore, is that this judgment should be modified, so that it shall adjudge that the dividends upon the stock in question, accumulated and to be declared, shall be paid to the plaintiff, during the lifetime of Georgiana I. Hotchkiss, and, as so modified, the judgment should be affirmed, without costs of this appeal to any party, save to the defendant Broadway Bank, to be paid out of the fund.

O'BRIEN, BARTLETT, and HAIGHT, JJ., concur; PARKER, C. J., MARTIN, and VANN, JJ., dissent.

*Judgment modified.*¹

SECTION V.

MARITAL PROPERTY.

DE NICOLS v. CURLIER.

HOUSE OF LORDS. 1899.

[Reported [1900] *Appeal Cases*, 21.]

EARL OF HALSBURY, L. C. My Lords, it is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the

¹ *Acc. Riddle v. Hudgins*, 58 Fed. 490. — Ed.

year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicile and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.¹

If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (*Lashley v. Hog*, 4 Paton, 581) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon

¹ The Lord Chancellor here stated the French law. — ED.

the very question in debate, and I think it may be stated shortly thus: If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (4 Paton, 617): "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will — why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate?"

It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the *jus mariti* it is described as a legal assignation to the husband, and in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2d ed. vol. i. p. 677, says: "At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports — a right of administering the property of the spouses; while the *jus mariti* was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable *communio*." . . . "The distinction is thus stated in argument in the Session Papers of Gowan v. Pursell:

The *jus mariti* over the movables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the movables that fall under communion." How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by section 1443 of Code Civil, which enacts that: "1443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly — that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right — the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract), the anomaly pointed out by the Master of the Rolls and sought to be explained becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicile may bring with it the consequential change from such relation.

Here, however, as I have endeavored to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term *jus relictæ* as arising from a reference to a dispute that appears to have existed in the Scottish authors as to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book, p. 671, where he says: "It has been found in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the *jus relictæ* and *legitim* are in all respects the same; that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming

into proper rights merely at its dissolution; that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs."

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute, in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

LORD MACNAGHTEN. My Lords, in 1854 Mr. De Nicols, the testator, and the appellant, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicols left Paris and came to London. They acquired an English domicile, and in 1865 Mr. De Nicols obtained a certificate of naturalization in this country. From that time forward their residence in England was continuous. Mr. De Nicols became a restaurant proprietor in London. He was successful in business, and amassed a large fortune, consisting of both movable and immovable property.

Mr. De Nicols died in February, 1897, having made a will in the English form and language.

The question for your Lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicile from French to English destroyed the community altogether, and, therefore, that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicile, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that the testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley v. Hog*, which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley v. Hog* for the moment, the only question would seem to be what was the effect according to French law of the

marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an antenuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in articles 1401 to 1496 in Title V. of the Code Civil, headed "Of Marriage Contracts and the respective rights of spouses."

In support of this conclusion, M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows: (Tables Générales [Contrat de Mariage] paragraphe 8.) "The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicile or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicile subsequently to the marriage." The case was this: An Englishman and an Englishwoman, a Mr. and Mrs. Boyer, were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next of kin. An action was brought for the return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself, of which it is an accessory." The revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations: that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune."

Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley v. Hog*, as to the effect of an English marriage without a settlement, it indicates, I think, the view which, according to French law, would be taken of the compact as to property constituted by a French marriage under the Code Civil without an antenuptial agreement.

The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavors to minimize its effect by treating it as a self-evident proposition — as in fact

being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicile or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicile and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicile the husband has £10,000 of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley v. Hog*, compelled them to decide in favor of the executors.¹

It appears to me that the case is not governed by the decision in *Lashley v. Hog*, and I think the appeal ought to be allowed.

LORD MORRIS, LORD SHAND, and LORD BRAMPTON concurred.²

DE NICOLS v. CURLIER.

CHANCERY. 1900.

[Reported [1900] 2 *Chancery*, 410.]

THE effect of the change of domicile with reference to the testator's movable goods only having been determined in the appeal to the House

¹ The learned Lord here stated and commented upon the case of *Lashley v. Hog*. — ED.

² The concurring opinions are omitted.

Acc. Blatchford v. Blatchford, 1 E. Dist. Ct. (Cape Colony), 365. — ED.

of Lords, the summons now came on for further hearing with reference to the testator's real and leasehold property.

KEKEWICH, J. Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicile, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the Code and the evidence given in explanation of it. On the present occasion the court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England — that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion, that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration — one of fact — namely, whether these estates are within the scope of the contract; the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the court. This evidence was directed to the proper meaning of “immeubles” in the French Code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France, some things are, from their close connection with the land, treated as attached to it, and, therefore, immovable; but these exceptions do not impair the general description, and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad — that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an English instrument which the court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the court. It is a matter of fact with which the court can

only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest, and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the Code as regards "immeubles" are of universal application — that is, apply equally to immovable property situate in France and to that situate in a foreign country.

Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story on the Conflict of Laws, § 158, the learned author says this: —

"The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract, the *lex loci contractus* (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries, it will govern movables, but not immovables, the former having no situs, and the latter being governed by the *lex rei sitæ*."

In the following section — 159 — he expounds this subject in a manner so apposite to the case in hand that it is worth while to quote it at length. It runs thus: —

"Perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonizes with the analogies of the common law, is, that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may be situate; but real or immovable property ought to be left to be adjudged by the *lex rei sitæ*, as not within the reach of any extraterritorial law. Where there is any special nuptial contract between the parties, that will furnish a rule for the case, and as a matter of contract, ought to be carried into effect everywhere, under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords, there is here a special nuptial contract between the parties ascertained by reference to the Code, but not less precisely ascertained because it was not reduced into writing in connection with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other

classes of contracts, one of which is, that as regards immovables, the *lex rei sitæ* must prevail. There is nothing in the common law of England to make the contract, which we have already seen to be definite, unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the Statute of Frauds, but that does raise a formidable objection. Reference was made in argument to both the 4th and 7th sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive — namely, *Forster v. Hale*, 3 Ves. 696, 5 Ves. 808, 4 R. R. 128; and *Dale v. Hamilton*, 5 Hare, 869. In the latter case Wigram, V. C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership, 6th ed. p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick v. Skidmore* (1857), 2 De G. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray v. Smith*, 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt, that is also a contract of partnership; but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in *Forster v. Hale* seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Wigram, V. C., in *Dale v. Hamilton*, and also, as it seems to me, of

Lord Lindley, who cites the passage from the Lord Chancellor's judgment in *Forster v. Hale*, which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her on certain terms described briefly by the phrase, "community of goods." Any lands subsequently acquired are an acquisition brought within, and are required to fulfil the purposes of the contract, and according to the Lord Chancellor's reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor's ruling, but I am unable to discover it, and must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.¹

SAUL v. HIS CREDITORS.

SUPREME COURT, LOUISIANA. 1827.

[Reported 5 Martin, New Series, 569.]

PORTER, J.² The tableau of distribution filed by the syndics of the insolvent was opposed in the court of the first instance; and the opposition being sustained, an appeal has been taken to this court, by the syndics, by the Bank of the United States, the Bank of Orleans, and the Bank of Louisiana.

The claims admitted by the judge *a quo*, and which are now contested here, are: 1st. That of the children of the insolvent, who claim as privileged creditors for the amount inherited by them from their deceased mother. . . .

From the facts admitted by the parties, which admission makes the statement on this appeal, it appears: That Saul and his wife intermarried in the State of Virginia, on the 6th of February, 1794, their domicile being then in that State; that they remained there until the year 1804, when they removed to the now State of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicile in this State, a large quantity of property was acquired, which at the death of the wife remained in the possession of her husband, the insolvent.

¹ *Acc. Scheferling v. Huffman*, 4 Oh. S. 241 (*semble*). — ED.

² Parts of the opinion are omitted. — ED.

The children claim the one-half of the property, as acquests and gains, made by their father and mother in this State. The appellants contend, that as the marriage took place in the State of Virginia, by whose laws no community of acquests and gains was permitted, the whole of the property acquired here belonged to the husband.

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different States. Our former experience had taught us, that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us, that the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings had we been called on to decide without the knowledge of what others had thought and written upon it. . . .

Recourse must be had to the former laws of the country.

The positive regulations of Spain on this subject are contained in two laws: one of the *Fuero Real*, and the other of the *Partidas*.

That part of the law of the *Partidas* which directly applies to the case before the court is in the following words: "E dezimos, que el pleyto que ellos pusieron entre si, deve valer en la manera que se avinieron ante que casasseu, o quando casaron; e non deve ser embargado por la costumbre contraria de aquella tierra do fuesen a morar. Esso mismo seria, maguer ellos non pusiessen pleyto entre si; ca la costumbre de aquella tierra do fizieron el casamiento, deve valer, quanto en las dotes, e en las arras, e en las ganancias que fizieron; e non la de aquel lugar do se cambiaron." P. 4, tit. 11, ley 24. "And we say, that the agreement they had made before or at the time of their marriage ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they may have removed. And so we say it would be if they had not entered into any agreement; for the custom of the country where they contracted the marriage ought to have its effect as it regards the dowry, the *arras*, and the gains they may have made, and not that of the place to which they may have removed."

Some verbal criticism has been exercised on this law. It is contended by one of the parties, that it only intended to provide for the gains made before the removal of the married couple; or, at all events, that the words used leave the sense doubtful. By the other, that it regulates all, whether made before or after they left the country in which the marriage took place. The expressions used, though not free from all ambiguity, as the appellants have argued, we think ought to receive the construction for which they contend. The law was so understood by the commentators of that day, and the preceding parts of it, compared with the clause in which the obscurity is said to exist, serve to support this interpretation. . . .

Nothing can be more satisfactorily shown than the opinion of the commentators on the statutes of Spain in relation to this particular subject. From the time Gregorio Lopez published his work on the *Partidas*, in the year 1555, down to Febrero, in the year 1781, the writings of no jurist of that country have been produced to us, who treats of this matter, that does not declare that the law of the *Partidas*, already cited, must be limited to property acquired in the place where the marriage is contracted, and that it does not extend to acquisitions made in another country, to which the parties may have removed, where a different rule should prevail. In the long list of writers who have been cited in support of this doctrine are to be found some of the most illustrious of whom the middle ages could boast, — James of Arena, Gulielmus de Cuneo, Dynus, Raynaldus, Jean Favre, Baldus, Alciat, and Ancharanus, Gregorio Lopez, on the 4 *Partidas*, tit. 11, law 24; Matienzo *Commentaria*, lib. 5, tit. 9, nos. 73 and 74; Febrero, p. 2, lib. 1, cap. 4, § 2, no. 62.

Trying the question, therefore, by authority, no doubt can exist, on which side it preponderates, in the country where the statute was passed. Admitting, therefore, for a moment, that the letter of the law of the *Partidas* was violated, by the construction given to it by the commentators; that violation acquiesced in for centuries, by lawyers, courts, and the sovereign authority of the country, makes as much a part of the law of Spain at this day as if the statute had been modified by the power in the State, in whom the right of legislation was vested. In looking into the laws of any country, we stop at the threshold, if we look no further than their statutes; and what we should see there would, in most instances, only tend to mislead. In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive and equally important part of the rules which govern men, is derived from what is called, in certain countries, common law, and here, jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means: that of reason alone. After a long series of years, it is sometimes difficult to say whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect cannot be distinguished from statutory law. No civilized nation has been without such a system. None, it is believed, can do without it; and every attempt to expel it only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with. Duponceau on Jurisdiction, 105. . . .

It is most clear, then, that this interpretation, which limits the law of the *Partidas* to the gains made in the country where the marriage was contracted and excludes from its operation property acquired after a change of residence, comes to us recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment, and whose duty it is to pronounce what the law is, not what it ought to be.

The appellants, however, contend, that although such may be the construction given to the statute in Spain, that construction is not binding on the court, because this is a question of jurisprudence not peculiar to any distinct nation, but one touching the comity of nations, and embracing doctrines of international law, on which the opinions of writers not living in Spain are entitled to equal weight with those who professedly treat of her laws.

The strength of the plaintiff's case rests mainly on this proposition, and it is proper to examine it with the attention which its importance in the cause requires.

But though of importance, it is not of any difficulty. By the comity of nations a rule does certainly exist, that contracts made in other countries shall be enforced according to the principles of law which govern the contract in the place where it is made. But it also makes a part of the rule that these contracts should not be enforced to the injury of the State whose aid is required to carry them into effect. It is a corollary flowing from the principle last stated, that where the positive laws of any State prohibit particular contracts from having effect, according to the rules of the country where they are made, the former should control. Because that prohibition is supposed to be founded on some reason of utility or policy advantageous to the country that passes it, which utility or policy would be defeated if foreign laws were permitted to have a superior effect. On the very subject-matter now before us, the writers who treat of it, although disputing about almost everything else, agree in stating that a real statute, that is one which regulates property within the limits of the State where it is in force, controls personal ones, which follow a man wherever he goes; indeed, it has been expressly, and with great propriety, admitted in argument, that where the personal statute of the domicile is in opposition to a real statute of situation, the real statute will prevail. Boullenois *Disc. Prelim.* p. 21; *ibid.* *des Demis.* quest. 6, 163; Boubier *sur la Coutume du Duché de Bourgogne*, cap. 23, 461; Rodenburgh *de Statutor. diversit.* tit. 2, cap. 5, no. 6.

If this be true, the question whether the opinions of foreign jurists shall control those of the country where the statute is passed, is at once settled. If the right of a nation to pass the statute, which will affect a contract made in another country, be admitted, the right cannot be contested to her to say whether she has done so or not. She surely is the best and safest expounder of her own laws. And we repeat here, what we said a few days since, on nearly the highest

authority to which we could refer: "That no court on earth, that professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal by which that misunderstanding was to be corrected." 10 Wheat. 159.

And if we did recur to the jurists of France and Holland for information, what would we get in place of the well-established rules in Spain? Much to confuse, and little to enlighten us. We should find great learning and ingenuity exercised by some to show that the law which regulates the rights of property among married persons is a personal one, which follows the parties wherever they go; by others, that it is real, and limited to the country by which it is made. But not one of them denies the power in a nation to pass a law such as has been lately enacted by the State of Louisiana, that a married couple moving into it from another State shall be governed by her laws as to their future acquisitions. None of them professes to comment on the laws of Spain, which her jurists say have the same effect with our late statute; they are not even mentioned by them. How wholly unsatisfactory, therefore, any general reasoning must be on different customs and usages, to prove that the law of the *Fuero* is a personal, and not a real statute, we need not say. . . .

An examination of the different treatises on this subject has convinced us that the greater number of the lawyers of those countries are of opinion that in settling the rights of husband and wife on the dissolution of the marriage, to the property acquired, the law of the place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the Parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bouhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found D'Argentre, Cravette, Everard, Vandermeulen, the Parliament of Rouen, the Supreme Court of Brabant, and that of Metz.

But it is evident, the opinions of the greater number of those who think that on the dissolution of the marriage the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and

it appears supported by quotations which he makes from his works. Boullenois, *Traite de personalité et de réalité des lois*. Obs. 29, p. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true that when parties married there was a tacit contract between them, their rights to property subsequently acquired should be governed by the laws of the country where the marriage took place; that tacit agreement would still be controlled by the positive laws of any country into which they might remove. This is admitted by Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional, "*Statutarium proprie non este nec legale, sed conventitium*," adds, such tacit convention cannot have this effect in another place, where there exists a contrary statute, which is absolute and prohibitive, "*alias si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium: tunc non haberet locum ultra fines sui territorii*." Dumoulin on the first book of the Code, verbo conc. de stat. et consuet. loc. Froland, *Mémoires sur les statuts*, chap. 4, 63.

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a real statute, which regulates things within the limits of the country where it is in force. The reason for both is the same, namely, that the laws of the country where the contract is sought to be enforced are opposed to it. Why the one should have effect and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not, but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it than it could the law which positively forbade such tacit agreement from having effect. So that even admitting this tacit agreement, we are brought back to the point from which we started; that is, whether the law regulating the right of husband and wife be real or personal?

But without agreeing with those who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to; that in supposing when parties marry, they intend the laws of the place where the contract is made should govern them wherever they go, *he begs the question*; and that the first thing to be settled is, whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the presumption must be, they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption, as to their agreement, cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the State where they were passed, then it cannot be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted; if it was real, and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was, to have known its limitations, as well as its nature, and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years, the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this limitation of time. If, on the contrary, the law is limited as to place, the tacit agreement which is founded on a supposed consent that the law should govern them, must be considered to have that limitation in view. In one word, the parties are presumed to have agreed, that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not? Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of anything expressed to the contrary, we cannot presume they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea, of tacit contracts, being made in relation to the laws of the country where they are entered into, is to say, that the agreement is to be construed the same way as if those laws were inserted in the contract. Now, supposing parties to marry in Louisiana, and that our statute, providing for the community of acquests and gains, is real and not personal; that it divides the property, acquired while in this State, equally between the husband and wife, but does not regulate that which they gain in another country to which they remove: the insertion of this law in a contract would be nothing more than a declaration, that while residing within this State, there should be a community of acquests and gains. An agreement such as this could not have the same force as an express one, by which the parties declared there should be a community of acquests and gains, wherever they went: for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us

in argument, *taciti et expressi eadem vis*, is only true where the law to which the tacit agreement refers contains the same provisions as the written contract.

It was evidently on this distinction the cases of *Murphy v. Murphy*, 5 Mart. R. 83, and *Gales v. Davis' Heirs*, 4 Mart. R. 645, were differently decided in this court. In the former, there was an express contract that there should be a community of acquests and gains between the parties, even though they should reside in countries where different laws might prevail. In the latter there was no express agreement; and the parties were not presumed to have made a tacit one, contrary to the law of the place where they married. They were not supposed to have agreed that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another State. If principles so plain required any authority, we would find it in the very author on whom the appellants principally rely. Dumoulin, after stating that the tacit contract will be controlled by a law that is contrary to it, in the country where the marriage is dissolved, adds: that it will be different where the agreement is express. "Nisi expresse de tali lucro conventium fuisset, quia pactio bene extenditur ubique, sed non statutum mere." Froland, *Mémoires sur les statuts*, cap. 4, p. 63.

Having thus stated the reasons why this doctrine of a tacit contract cannot be admitted by us to the extent pressed by the counsel, it only remains for us to examine whether the law of the Fuero was a real or personal statute. We consider it real. It appears to us to relate to things more than to persons; to have, in the language of D'Aguesseau, the destination of property to certain persons, and its preservation in families, in view. It gives to the wife and her heirs the one-half of that which would otherwise belong to the husband. Boullenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the State and condition of the spouses; and he goes so far as to declare, that if his adversaries will not allow this doctrine to be correct, then the statute is real, for on no other ground can it be considered personal. We think the State and condition of both husband and wife are fixed by the marriage, in relation to everything but property, independent of this law; and as it regulates property alone, it is not a personal statute. Boullenois, *Traite des statuts*, cap. 5, obs. 29, p. 751; cap. 2, obs. 5, 80.

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence, and what is settled there cannot be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence as the subjects of Spain have, except so far as the genius of our government, or our posi-

tive legislation, has changed it. How the question would be decided in that country if an attempt were made there on the authority of French and Dutch courts and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the *auto* already cited, in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees from the time of their removal into this State; and that the court below committed no error in placing them on the *bilan* as privileged creditors, for the amount of those acquests which remained in their father's possession at the dissolution of the marriage.¹

SMITH v. MCATEE.

COURT OF APPEALS OF MARYLAND. 1867.

[Reported 27 Maryland, 420.]

CRAIN, J. The attachment in this case was issued by the appellee to affect the proceeds of sale of the real estate of the wife, to pay the debt of the husband. The facts as presented in the record are, that Nicholas Leister and wife were citizens of this State until August, 1854, when they removed to Illinois, where they resided when this attachment issued. Before removing from the State Leister became indebted to the appellee, who has always resided in Washington County, Maryland. The fund in controversy was derived from the sale of the real estate of Mary Gehr, the mother of Sarah Leister, the wife of Nicholas.

Mary Gehr died in 1855, leaving real estate in Washington County, and by her last will and testament devised a child's share of said estate to Sarah, the wife of Nicholas. In January, 1856, a bill was filed in the Circuit Court for Washington County against Leister and wife and the other devisees, for the sale of the real estate for partition. The bill was answered by Leister and wife. In their answer Sarah, the wife of Nicholas, claimed her portion of the estate as her sole and separate estate, free from the debts of her husband, and insisted that the same should not be divested from her by a sale thereof. Nicholas, the husband, disclaimed all right, title, or interest at law or in equity to any portion of the estate of Mary Gehr, by virtue of his marriage with the said Sarah or otherwise. A decree was passed in the cause

¹ This case is generally followed in this country, title in after-acquired personal as well as real estate vests according to the law of the new domicile. *Bease v. Pellochoux*, 73 Ill. 285; *Long v. Hess*, 154 Ill. 482, 40 N. E. 335; *Hyman v. Schlenker*, 44 La. Ann. 108; *Muns v. Muns*, 29 Minn. 115; *Gidney v. Moore*, 86 N. C. 484; *Castro v. Illies*, 22 Tex. 479; *Fuss v. Fuss*, 24 Wis. 256. —ED.

on the 12th of August, 1856, for the sale of the property, and in the decree it was provided that the proportion of the proceeds of the sale of the property allotted to Sarah should be deemed her separate estate, for her sole and separate use and benefit, free from any claim or control of her husband or his creditors. After the sale of the property the amount of the proceeds due Sarah was credited to her sole and separate use, and paid over to the appellant as her attorney, when it was attached by the appellee to pay the debt of her husband.

At the trial of the cause two bills of exception were taken by the appellant; the first to the admissibility of evidence, and the second upon the granting of the plaintiff's and the rejection of the defendant's prayers. To arrive at a proper solution of the questions to be determined by this appeal, we must ascertain the rights of Sarah, the wife, under the will of her mother and the proceedings and decree of the court, and whether the proceeds of the estate audited to her and received by Mr. Smith, as her attorney, were liable to be attached in our courts for the payment of the husband's debt. In 1841, the legislature, recognizing the just and equitable right of the wife to the enjoyment of her real estate, passed a law to protect the real estate of the wife from the debts of the husband. This legislation in favor of the wife against the creditors of the husband so favorably impressed itself upon the public mind, that by the 38th section of the 3d article of the constitution of 1851, the legislature was required to pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death. The legislature, acknowledging the wisdom of this provision, in obedience to the mandate of the constitution, enacted the law of 1853, chapter 245. That act provides that *all* the property of the wife acquired or received, after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way be liable for the payment thereof. And to effect the objects of the law, the wife was given the benefit of all such remedies for her relief and security as then existed, or should be devised in the courts of law or equity, without the necessity of the interposition of a trustee. The object contemplated by this law is too clear for doubt; by its enactment the legislature intended to give full protection and security to the property of the wife against the creditors of the husband, as previous to its enactment the cases of *Peacock v. Pembroke and Clarke*, 4 Md. Rep. 280, and *Turton's Ex'rs v. Turton*, 6 Md. Rep., 375, had been decided by this court, and in each case the property was adjudged to be the husband's and subject to the payment of his debts. This act, soon after its passage, received a judicial interpretation in the case of *Unger and Wife v. Price*, 9 Md. Rep., 552. In that case, Mrs. Unger had sold her potential right of dower, and invested the money in personal property, and it was held by this court to be exempted from the debts of the husband. The case of *Mrs. Leister* is equally strong, and comes

within the principle settled in *Unger and Wife v. Price*. She was the devisee of real estate, and with the consent of her husband the proceeds of sale of the property under the decree of a court of equity were held to her sole and separate use, so audited to her and paid over to the appellant. But the appellee insists, that the proceedings and decree were not admissible evidence against him, because they were *res inter alios acta*. We admit, as a general rule, that judgments and decrees are evidence binding only between parties and privies. But there are many exceptions to this rule, and we are of opinion that this case forms one of the exceptions and comes within the principle settled by this court in the case of *Key v. Dent*, 14 Md. Rep. 96. The record was introduced in this case to show how the fund was derived, and that the conversion from realty into personalty was not to prejudice the rights of the wife. For that purpose, according to the decision in *Key v. Dent* and the authorities relied on by Justice Eccleston, who delivered the opinion of the court, the record was evidence. *Head's Rep's. v. McDonald*, 7 Mon. 207; 4 Phillips on Evidence, 920, 921, 977 (ed. of 1843). The record was confirmatory of the answers of the garnishee and proof that the decree was had as there set forth. It was a decree of a court of competent jurisdiction, which in the exercise of its powers as a court of chancery settled the property to the sole and separate use of Mrs. Leister. And although we find this right of the wife to her property, protected in this State by public policy, by statute, and by a decree of a court of equity, yet it was earnestly contended by the learned counsel for the appellee, that a creditor of the husband had a right to attach this fund in our courts of justice for the debt of the husband, as by the laws of Illinois, where the husband and wife resided, the husband was entitled to all the personal property of the wife, and that by virtue of this law of the domicile the fund was vested in the husband. And he claimed this right to divest the wife of her property by the law of the domicile, on the ground of comity. In this case we cannot sanction such a right, for it has been decided that comity is overruled by positive law, and that it is only in the silence of any particular rule, affirming, denying, or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government. *Gardner v. Lewis*, 7 Gill, 395. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and "no State will suffer the laws of another to interfere with her own, and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of the stranger." *Story's Conflict of Laws*, § 28. The courts of our State have perfect jurisdiction over all personal property as well as real within its limits, belonging to the wife, and they have a right to protect both from the debts of the husband. If therefore our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a question in our own courts which shall prevail. "Where

there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own State." *Davis v. Jacquin*, 5 Har. & J. 109; *Gardner v. Lewis*, 7 Gill, 395.

As this fund by our laws is held by the appellant for the sole and separate use of Mrs. Leister, a creditor of the husband seeking a remedy against him in our courts must be governed and regulated by our laws; for Justice Story says: "A person suing in this country must take the law as he finds it, and wherever a remedy is sought, it must be administered according to the *lex fori*; and such a judgment is to be given as the law of the State where the suit is brought authorizes." Story's *Conflict of Laws*, §§ 571, 572. And in this court, in the case of *Wilson & Co. v. Carson & Co.*, 12 Md. Rep. 75, Le Grand, Chief Justice, says: "The recognition of the laws of another State, in the administration of justice in this, is not a right *stricti juris*; it depends entirely on comity, and in extending it, courts are always careful to see that the statutes of their own State are not infringed to the injury of their own citizens."

We think these authorities decisive of the question, and that the appellant has a right to rely in a court of law upon the title of Mrs. Leister to the fund in controversy. Her right had not been divested by her own act or by operation of law, and the fund in his hands was not liable to be attached by the creditor of the husband.

The views which we have expressed of the legal propositions governing this case are conclusive upon the right of the plaintiff to recover, and it is unnecessary to examine the first bill of exceptions, to ascertain whether the evidence offered by the defendant of the laws of Illinois touching the rights of husband and wife were admissible or not. It follows from what we have said, that the instructions given by the court at the instance of the plaintiff and contained in the second bill of exceptions were erroneous. The prayers asked by the defendant's counsel embrace in our opinion the true theory of the law of the case and ought to have been granted. For these reasons we reverse the judgment of the Circuit Court.

*Judgment reversed, without procedendo.*¹

HARRAL v. HARRAL.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[Reported 39 *New Jersey Equity*, 279.]

FREDERICK F. HARRAL was born in Connecticut in 1842. He graduated at Yale College in 1863, and at the College of Physicians and

¹ *Acc. Loftus v. Bank*, 133 Pa. 97. As soon as the proceeds of a married woman's separate real estate are transmitted to the matrimonial domicile, they are held according to the law of the latter place. *Castleman v. Jeffries*, 60 Ala. 380. — ED.

Surgeons in New York City, in 1868. He was married on the 20th of February, 1877, before the deputy mayor, in the city of Paris, to Clarice Marie Le Gars, a Frenchwoman. In May, 1878, he returned to this country, and died at Kirkbride's hospital for the insane, in Philadelphia, July 5, 1881.

On the 9th of July, 1869, and before his departure for Europe, the decedent duly made and executed a will, devising and bequeathing all his property, real and personal, to his brother and sisters, and appointing William Creighton Peet and Hamilton Wallis executors. This will was admitted to probate in the prerogative court of this State on the 31st of July, 1882.

The widow filed this bill in the Court of Chancery of this State, to which the legatees under the will of her husband and the executors are parties.

The prayer of the bill is that the personal estate of the decedent, so far as concerns the complainant's interest therein, should be distributed in accordance with the laws of France.

On final hearing, on bill answer and depositions, the chancellor made a decree in accordance with the prayer of the bill. From that decree the defendants appealed.

DEPUE, J. The law of France in relation to the rights of husband and wife in the property of either spouse is established by the Code Napoléon. Before the French Revolution, the northern provinces of France were under the customary law, and the community of property governed the nuptial contract; in the southern provinces the Roman law prevailed, and the contract was governed by the dotal system. The Code Napoléon left the parties to elect the law by which the marriage should be governed; and if no election was made, the community system was to prevail. 2 Kent, 187, note. Section 1391 of the Code provides that the parties may declare in a general manner that they intend to marry either under the law of community or under the law of dowry. The community is either legal or conventional. Legal community is established either by a simple declaration that the parties marry under the law of community, or by a marriage without any contract on the subject. Sections 1400, 1497. There was no marriage contract between these parties with respect to property; and if disposition of the personal estate in question is to be made by the French law, it must be disposed of as community property.

Community is divided by the Code into two classes — active and passive. The former relates to the disposition of property; the latter, to liability for debts. The property which is comprised in the community consists of (1) All the movable property which the married parties possessed on the day of the celebration of the marriage, and all movable property which falls to them during the marriage, by succession, or even by donation, if the donor has not expressed himself to the contrary; (2) All the fruits, revenues, interest, and arrears of what nature soever they may be, fallen due or received during the marriage,

and arising from property which belonged to the married persons at the time of the celebration of the marriage, or from such as has fallen to them during the marriage by any title whatsoever; and (3) All immovable property acquired during the marriage. Section 1401. This community, whether it be conventional or legal, commences from the day of the marriage contracted before the officer of the civil power. Section 1399. During the coverture the husband has the custody, control, management, and power of disposition (under some restrictions) of the community property (sections 1421, 1422); and he may make a testamentary disposition of his portion of the community property, but of no more. Section 1423. After the death of the husband the wife may accept or renounce the community. Section 1453. If she accept it, her share — that is, the one-half part of the community property — is given to her, subject, in the partition, to certain specified deductions and allowances by way of compensation. Sections 1467, 1480.

The complainant, in her bill, charges that the legal domicile of the decedent, at the time of his death, was in France, and insists that from the time of the celebration of her marriage with the testator, by force and operation of the laws of France, a legal community was established between her and her husband as to all the personal or movable property possessed or owned by either of them during the marriage, and in all the fruits, revenues, interest, and income thereof; and that upon the death of the testator she was entitled to have and receive, absolutely, for her own use and benefit, the one-half part of all such property so held in community between herself and her husband, and that it was not in the power of her husband to dispose of that share or interest in said property, which, by the laws of France, belonged to her.

The defendants, in their answer, admit that the testator was married to the complainant on the 20th of February, 1877, at Paris; but they say that the marriage was void for the reason that the testator at that time was of non-sane mind, and incompetent to enter into a contract of marriage. They admit that the testator lived in Paris for five years before his marriage, but deny that his legal domicile was, at the time of his marriage, or at any time, in France, and insist that distribution of his personal estate should be made under the laws of New Jersey. They also say that by the law of France no man can become domiciled in France without he shall have first applied to the French government for permission to do so, and obtained an express authorization from the government to establish such domicile, and that the testator never obtained an authorization to establish his domicile in France, and never became domiciled there by the laws of that country.

The chancellor, in his opinion, considered the evidence on the subject of the testator's mental condition at the time of his marriage, and reached the conclusion that the testator was not at that time mentally incapacitated to contract marriage or to change or establish his domi-

cil. The evidence shows that the decedent, for some time, had been addicted to intemperance, and that his physical and mental vigor had been impaired by indulgence in drink; but it falls short of proof that, at the time of his marriage, his mental faculties had become so impaired as to incapacitate him from entering into a contract of marriage, or from deciding upon the place of his domicile. The answer contains no allegation of fraud or imposition upon the decedent in procuring the marriage. The case turns wholly upon the applicability of the community law to the testator's personal estate in the hands of his executors.

When the testator went abroad in 1869, his property consisted of personal estate, and a house and lot in Bridgeport, Connecticut. The personal estate he left in charge of Mr. Wallis, to be invested and cared for, and it remained in charge of the latter during the lifetime of the decedent. This personal estate, amounting to about \$50,000, at the testator's death came to the hands of the executors. This controversy relates wholly to the personal estate.¹ . . .

The complainant's counsel contended that inasmuch as the marriage was celebrated in France, the wife, immediately on her consummation of the marriage, acquired a vested right in her husband's property, independent of any question of domicile, and that her right in the personal property of the husband was a *jus* acquired by the marriage by virtue of the French law, which could not be invalidated by any extraneous circumstances. This view has had some support in the opinions of writers on international law, but is contrary to the course of decision in the courts of this country, and, I may add, to the later decisions of the courts elsewhere. The doctrine generally adopted and supported by reason and public policy is, that a marriage celebrated according to rites and ceremonies recognized by the laws of the country where the marriage takes place, is valid everywhere; and, as a general rule (not without exceptions), by that law the capacity of the parties to contract a marriage is determined. Whart. on Conf. of Laws, §§ 161, 162, 164; Story on Conf. of Laws, §§ 113, 113 *a*, 114, 123 *b*, 124, 124 *a*; Bish. on Marr. and Div. §§ 357, 359, 363, 370; Moore v. Hegeman, 92 N. Y. 521. But with respect to the property rights of husband or wife in the personal property of either, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights depend on what is known in law as the matrimonial domicile. Le Breton v. Nouchet, 3 Mart. (La.) 60, 81; Ford v. Ford, 2 Mart. (N. S.) 574; Allen v. Allen, 6 Rob. (La.) 104; Kneeland v. Ensley, Meigs (Tenn.) 620; Glenn v. Glenn, 47 Ala. 204; Mason v. Homer, 105 Mass. 116; Story on Conf. of Laws, §§ 186, 193; 2 Pars. on Cont. 590. Mr. Wharton says that the place of the celebration is not necessarily the place of the performance of the marriage, which, he says, the later jurists have agreed is its true legal site, and that this place of performance is the matrimonial domicile to which the husband and wife propose

¹ Here follows a discussion on domicile, for which see *ante*, Vol. I. p. 195. — Ed.

to repair. Whart. on Conf. of Laws, § 192. On the marriage, the legal presumption is that the wife takes the domicil of her husband, and her rights are subject to the law of his domicil ; but that presumption is overcome, and the legal inference is superseded when, on the marriage, the parties adopt a place for their matrimonial domicil — in which event the matrimonial domicil will control, and will regulate the property rights of the parties in movables.

The authorities are quite generally in accord in selecting the matrimonial domicil as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either, which was *in esse* when the marriage took place. Perplexing questions sometimes arise as to what place shall be deemed the true matrimonial domicil in the sense of this rule. Mr. Justice Story supposes a case where neither of the parties has a domicil in the place where the marriage was celebrated, and the parties were there *in transitu*, or during a temporary residence, or on a journey made for that sole purpose *animo revertendi*, and says that the principle maintained by foreign jurists in such cases would be that the actual or intended domicil of the parties would be deemed to be the true matrimonial domicil ; or, to express the doctrine in a more general form, that the law of the place where, at the time of the marriage, the parties intended to fix their domicil would govern all the rights resulting from the marriage. He also supposes the case of a man domiciled in one State marrying a lady domiciled in another State, and says that foreign jurists would hold that the matrimonial domicil would be the domicil of the husband if it was the intention of the parties to fix their residence there, or the domicil of the wife if it was their intention to fix their residence there, or in a different place from the domicil of either the husband or wife if they intended to establish their matrimonial domicil in some other place. He then refers to the decisions of the courts of Louisiana, adopting the same principle, and concludes that, " under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm that a contrary doctrine will scarcely hereafter be established ; for, in England as well as in America, in the interpretation of other contracts, the laws of the place where they are to be performed has been held to govern. Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated), there is the rule of analogy to govern it ; and treated as a matter to be governed by the municipal law to which the parties were, or meant to be, subjected by their future domicil, the doctrine seems equally capable of a solid vindication." Story's Conf. of Laws, §§ 191-199. All perplexity on this subject is removed where, as in this case, the place where the marriage is celebrated, the domicil of the wife, and the establishment of a home after the marriage, concur. The place of contract and the place of performance being the same, on legal analogies there would seem to be no doubt that that place would be the matrimonial domicil, and that the incidents of the marriage would be determined by the law of that place.

Nor can that question, which has given rise to great diversity of opinion where new property has been acquired after the marriage, and in a new domicile, arise in this case, for the property to which this controversy relates was *in esse* at the time of the marriage, and the matrimonial domicile then established continued until the husband's death; and it is universally allowed that, when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property are to be regulated by the law of the matrimonial domicile, so long as that remains unchanged. Westlake's Int. Law, § 366.

The French law recognizes a conjugal domicile analogous to what is known in our law as a matrimonial domicile, and is distinguished from that domicile which is required for the purpose of contracting a lawful marriage; and the law of that country, with respect to the effect of the conjugal domicile upon the rights of husband and wife in the movable property of either spouse, is in accordance with the views above expressed. George Merrell, a witness called by the defendants, who is not an attorney or *avocat* in the French courts, being a foreigner who studied law in New York City, said that a foreigner cannot acquire a domicile in France without complying with Article 13 of the Code, except it be a matrimonial domicile, which he defines to be the residence necessary to confer jurisdiction on the magistrate for the celebration of the marriage; and that in the case of an American citizen establishing his residence in France, with intention of making that his permanent home, marrying and living there, not having received the government authorization, according to the Code, his personal property would be distributed according to the American law. On the other hand, M. Goiraud, a French lawyer called by the complainant, testified that the domicile necessary for a foreigner to contract a legal marriage required only a residence, in fact, for six months, and that the domicile which was to govern the marriage relations of the parties would be the conjugal domicile, which he defined to be the domicile which had been chosen by the parties, either at the time of the marriage or after the marriage, in order to be finally settled. M. Clunet, *avocat* of the court of Paris, called by the complainant, testified that French jurisprudence, in order to establish the marriage relation of the parties married without a contract, takes, as a principle, their supposed intention, and finds the expression of that intention in what is called the conjugal domicile, or, in other words, the place where, after the marriage, the parties establish themselves. Both these witnesses agree that government authorization is not required for the establishment of a conjugal domicile in France, which, when the marriage is celebrated in France without a contract, will make the property of a foreign-born husband subject to the community law.

The decisions of the French courts sustain the opinions given by M. Goiraud and M. Clunet. In Breul's Case, Sirey (1854), 2,105, translated in 4 Phillim. Int. Law, 226, and more fully in Cole on Domi-

cil, 45, 47, Breul was a Hanoverian; he married a Frenchwoman in France, and died there; at the time of his marriage, and at his death, he was domiciled in France, but had not obtained a governmental authorization for that purpose. On appeal, the question was whether there was a community of goods between husband and wife. The court held that there was, and that foreigners were capable of entering into all contracts depending on the law of nations, and could, when they marry in France, accept tacitly the rule of community, established by law, in the same way as they might have made that rule the subject of express stipulation in a formal contract; that, to make this principle apply to foreigners, it was not enough that the marriage was celebrated in France; but that it was also necessary that the intention of the contracting parties to adopt the community should be manifested by affirmative acts; that the establishment of a domicile in France had always been regarded as the most positive manifestation of such intention; that the domicile ought to have an importance to distinguish it from simple residence, but it was not necessary that it should have been authorized by the government under Article 13, for the reason that the object of this authorization was to confer on the foreigner all the civil rights of native-born Frenchmen, and that these rights were not necessary in a foreigner in order to enable him to enter into matrimonial conventions, which are purely of the *jus gentium*.

In *Lloyd v. Lloyd*, Sirey (1849), 2, 220; in *Cole on Domicil*, 37, and translated in a note to *Whicker v. Hume*, 13 Beav. 401, James Lloyd, a foreigner, whose birthplace was unknown, and who was, by presumption and residence, an Englishman, came to France, and established himself there permanently. In 1836 he married, at Paris, a Frenchwoman, without a marriage settlement. He had three children by the wife before marriage, and three afterwards. He continued his residence, and died in Paris, leaving his wife and the six children surviving him. The widow claimed, before the French court, that portion of the property which would belong to her by the French law, if she and her husband were married under the *régime* of the *communauté des biens*. Her right depended on whether, at the time of the marriage, the decedent had a legal domicile in France. He never had applied for or obtained an authorization under Article 13 of the Code. The Tribunal of the Seine decided against her claim, but the decree was reversed by the Court of Appeal, and the claim of the widow sustained. The court said that "it is fruitless to contend that the domicile of James Lloyd, in France, was not accompanied by the authorization of the government, required by Article 13, and therefore it cannot be taken into consideration as regulating the conjugal domicile, for it is a fixed principle of law, as well before as since the Code, that a foreigner, even when he preserves that quality, could acquire a domicile in France; that Article 13 of the Code did not intend to change this state of things; that it is only when a foreigner wishes to possess such a domicile in France, as will confer upon him all civil rights, that the

authorization of government is required ; that in the present case it is not a question as to a civil right, exclusively appertaining to a French citizen ; that the tacit agreement as to the community of goods, resulting from submission to Articles 1393, 1399, 1340, and the succeeding articles, was purely derived from the law of nations."

In Fraix's Case, Fraix was a Savoyard, and settled in Paris, where he married his second wife, a Frenchwoman. The question was whether he married under the French *communauté des biens*. The court held that although he had not been authorized by the government to establish his domicile in France, a domicile was not necessary to make the *communauté* applicable, which is presumed to have been the intention of the parties when they fixed themselves in France. 4 Philim. Int. Law, 231.

In Ghisla's Case, decided in 1878, Ghisla was a Swiss by birth. He married a Frenchwoman in France, and before and after his marriage had his domicile in Marseilles, and in that place died. His widow claimed the benefit of the community law, and it was adjudged to her by the court of Aix, the ground of the decision being that, where one of the married couple is French, and the other a foreigner, they are, in the absence of a contract, governed by the law of the conjugal domicile ; that the intention of the parties is to be considered before their nationality, and that to the fixing of the conjugal domicile, government authorization was not required, for whatever appertains to the marriage belongs rather to the *jus gentium* than to the civil law, properly speaking. Jour. Int. Law, 1878, 610. In Dagès v. Laborde, it was held that the legislation applicable to the civil interests of a marriage was that of the place where the married couple established their domicile immediately after the marriage, and where it appeared that it was their intention to fix the principal place of their business, and to raise their family, and that this domicile was denominated their matrimonial domicile. Court of Pau, 1835, affirmed in the Court of Cassation, December, 1836, Journal du Palais, 1837, 1, 587.

Giovanetti v. Orsini, Sirey (1855), 699, is the converse of the cases cited. In that case a Frenchman, while domiciled in Tuscany, married an Italian woman in Florence. They afterwards removed to France. On her death, the question arose in France as to the matrimonial *régime* governing the estate of the deceased wife. There had been an agreement, subsequent to marriage, with respect to property, not valid under the French law. The court held that the marriage having been contracted at Florence, and the parties having, at the epoch of their marriage, fixed their matrimonial domicile in Tuscany, the marriage was necessarily under the influence of the Roman law, which governed such matters in Tuscany, according to which, agreements subsequent to marriage were authorized and valid. Cole on Domicil, 41.

Morand v. Commune de Mézère, Sirey (1873), pt. II., 148, much relied on by the defendants, is not in point. The parties were married in Sardinia, and then removed to France. The husband settled in

Paris, and had his principal establishment there, but did not obtain authorization from the government. His daughter was born in France. He died in 1855, and his widow in 1867, making the commune her residuary legatee. The court held that Morand was a foreigner, and so were his wife and daughter, and therefore the laws of France did not govern the succession. The effect of a French marriage, followed by a conjugal domicile in France, was in no wise involved.

I think it is clearly shown, not only by the testimony of the French lawyers, who were witnesses in this case, but also by the French decisions, that it is the law of that country that the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law, and that a government authorization under Article 13 of the Code is not necessary to the establishment of such a domicile.

The decree of the chancellor should be affirmed.

*Decree unanimously affirmed.*¹

BOND v. CUMMINGS.

SUPREME JUDICIAL COURT OF MAINE. 1879.

[*Reported 70 Maine, 125.*]

LIBBEY, J. This is trespass against the defendant, as sheriff of Aroostook County, for a mare. The defendant justifies the taking by his deputy by virtue of an attachment of the mare as the property of John Bond, the plaintiff's husband, on a writ in favor of R. S. Starrett against him.

The plaintiff claims title to the mare by virtue of a purchase from her husband while living with him, and having no separate support, in the province of New Brunswick, from which province they moved into this State about the time of the attachment. No purchase is claimed to have been made in this State.

By the law of New Brunswick a married woman, living with her husband and having no separate maintenance, cannot acquire title to property by purchase from him. The validity of the contract under which the plaintiff claims title must be determined by the law of that province.

“Matters bearing upon the execution, the interpretation, and the

¹ *Acc. Mason v. Fuller*, 36 Conn. 160; *Davenport v. Carnes*, 70 Ill. 465; *Brien v. Marchildon*, Rep. Jud. Quebec, 15 C. S. 318.

This is true even though the marriage was abroad at the woman's domicile, and the wife always remains there. *Succession of McKenna*, 23 La. Ann. 360; *Breton v. Miles*, 8 Paige, 261; 18 Clunet, 549 (French Cass. 9 March, '91); 19 Clunet, 1068 (Geneva, 18 March, '82). — Ed.

validity of a contract are determined by the law of the place where the contract is made." *Scudder v. Union National Bank*, 91 U. S. 406. Story, Conf. of Law, §§ 242, 243.

Bringing the mare into this State gave the plaintiff no title which she did not acquire by virtue of the purchase from her husband, by the law of New Brunswick; and the mare was legally attachable here as the property of the plaintiff's husband. *Plaintiff nonsuit.*¹

FRIERSON v. WILLIAMS.

SUPREME COURT, MISSISSIPPI. 1879.

[Reported 57 Mississippi, 451.]

GEORGE, C. J.² The plaintiff in error filed his bill in the Chancery Court of Coahoma County against John Williams and his wife for the purpose of collecting out of the separate estate of Mrs. Williams a note for six thousand and fifty dollars, made by Williams and wife, in February, 1873, payable to the order of Williams, the husband, and by him indorsed to the plaintiff in error for money then advanced by the latter to said Williams. The note was made at New Orleans, in the State of Louisiana, where Williams and his wife reside. The property sought to be charged with the debt is land situated in Coahoma County, and is the separate estate of Mrs. Williams, under a devise made to her by her sister, Mrs. McGuire, who died in 1863. By her will she provided as follows: "My whole estate, real and personal, shall go to my sisters, Ellen Mayes, wife of R. B. Mayes, and Louisa Williams, the wife of John Williams, for and during their natural lives; and this bequest is to their sole and separate use in which their husbands respectively shall have no right or interest." . . .

It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the *lex loci contractus*, it is void everywhere. This position is true,

¹ So generally, when personal property falling to the wife becomes the husband's by the law of their domicil, a subsequent change of domicil will not alter the existing rights of the husband. *Cahalan v. Monroe*, 70 Ala. 271; *Lichtenberger v. Graham*, 50 Ind. 288; *Lyon v. Knott*, 26 Miss. 548; *Davis v. Zimmerman*, 67 Pa. 70. And so as to the wife's rights in her husband's chattels; *Kraemer v. Kraemer*, 52 Cal. 302.

Conversely, where personal property falling to a wife becomes her separate estate, removal into another State does not affect her rights. *Hinman v. Parkis*, 33 Conn. 188; *Townes v. Durbin*, 3 Met. (Ky.) 352; *Reid v. Gray*, 37 Pa. 508.

When a wife becomes trustee of personal property in accordance with the law of the domicil, she continues to hold the position after removal. *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572. — Ed.

² Part of the opinion only is given. — Ed.

if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer, that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this State, and that she contracted with reference to this separate estate, and intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. The note, if made here, would be equally void by our laws to bind the wife personally; yet, notwithstanding this, it would be held, if made with the intent and purpose alleged in the bill, to be a valid charge against her separate estate situated here.

It is generally true that the capacity of a married woman to make a contract will be determined by the law of her domicile; but this is not the rule when her contract relates to her estate in realty, situated in another jurisdiction. Judge Story says: "The general principle of the common law is that the laws of the place where such [immovable] property is situate exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex rei sitæ*." Story, Conf. Laws, § 424. And quoting from Sir William Grant: "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated;" he says: "The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate." Mr. Burge, as quoted by Judge Story, in a note to section 445 of the same work, says: "The power to alienate immovable property by contract was a quality impressed on the property; that the law from which it was derived, or by which it is regulated, was a real law; and that the existence of this power and the validity of its exercise must be decided by the law of the country in which the property was situated." And it is said by a learned author: "No sovereignty can permit the intrusion on its soil of a foreign law. Such a law may be accepted by comity in cases in which a contested issue, the law applicable to which is foreign, comes up for determination in a home court. But the imposition of any other law than the *lex rei sitæ* as to property, would be to give foreign subjects and foreign laws an absolute control, unchecked by any discretion of the home courts, over a subject-matter essential not merely to the independence, but the vitality of the State. . . . The mischief is cured by the adoption of the rule *lex rei sitæ regit*; whoever may be the owner, or wherever the contract was made, the law of the land reigns. No other law, either as to the transfer or control of the property, is to intrude." Wharton, Conf. Laws, §§ 278, 280. These rules apply to marital rights in realty. Judge Story, after speaking of the rights of husband and wife as to personal property situated beyond the mat-

rimonial domicil, says: "But real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extraterritorial law;" and in *Vertner v. Humphreys*, 14 S. & M. 180, 143, this court said that, "As to immovable property, the law of the place where it is situated fixes the rights of husband and wife in it."

The application of these principles will furnish a safe solution of the question under consideration. The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this State. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observances of the forms and solemnities prescribed by those laws, yet, if valid by the law of this State, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the Chancery Court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge, and the exercise of a power of administration and control over it, which, as we have seen, is governed solely by the *lex rei sitæ*. To show that this is its true nature, we have only to suppose that, by the law of Louisiana, the note was a charge on her realty situated there, and was not by our law a charge on the realty situated here. In such a case, it would be evident that an attempt to enforce it here against her real estate could not succeed. If success could attend such an effort, then the several rights and powers of husband and wife, as to realty, would not be fixed and governed by the laws of the situs; and the act of a wife, done in a foreign State, would have the effect of disposing of her realty here, contrary to our laws.

But there is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face, — a personal obligation of the wife; and it is void for the same reason in both, viz., the personal incapacity of the wife. The difference between the two laws is as to the effect on the real property of the wife in the respective jurisdictions of the two States, and as to which, as we have above seen, the law of the State in which the realty is situated is the exclusive test. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister State, adjudge it void to that extent, if attempted to be enforced here; but the principle of

comity does not require a State to regard the laws of any other State, so far as they may affect contracts in relation to real estate situated in the former State.

*Decree reversed, demurrer overruled, and cause remanded.*¹

BONATI v. WELSCH.

COURT OF APPEALS, NEW YORK. 1861.

[*Reported 24 New York, 157.*]

ACTION by a widow residing in France, against the executors and legatees of her deceased husband, to recover the value of certain real estate inherited by her, which was sold with her assent, and the proceeds received by her husband while she was living and domiciled with him in France.²

DAVIES, J. By section 1387 of the Code Napoléon, the law in reference to the conjugal relation is prescribed in default of special agreement; and by section 1393, in default of special stipulations, the law of community prevails. By sections 1401 and 1402, the community consists of such movable property as falls to either party during the marriage by any title whatever, and all immovables acquired during marriage. By section 1404, the immovables which fall to them during marriage by title of succession do not enter into the community. Section 1433 provides that if an immovable belonging to one party be sold and the price paid into the community, there is ground for the deduction of the price so paid in from the community for the benefit of the party who was proprietor of the immovable sold. Section 1436 declares that recompense for the price of an immovable belonging to the wife is claimable by her out of the property of the husband, in case of the insufficiency of the goods of the community. By section 1470, on the dissolution of the community, from the mass, each one deducts the price of immovables which have been alienated during the community, and for which compensation has not been made. By section 1471, the shares of the wife take precedence of the husband, and by section 1472 the wife is entitled, in case of insufficiency in the community, to exercise her claims out of the property of the husband. Section 1441 declares that the death of either of the parties works a dissolution of the community, and by section 1453 after the dissolution the wife has the power to accept or renounce it. By section 1493, the

¹ *Acc. Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. And see *Wood v. Wheeler*, 111 N. C. 231.

So generally, the effect of a marriage contract executed abroad upon land is determined by the *lex rei sitæ*. *Heine v. Mechanics' & Traders' Insurance Co.*, 45 La. Ann. 770, 13 So. 1; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974. — Ed.

² The statement of facts and the dissenting opinion are omitted. — Ed.

wife who renounces has a right to receive the price of the immovables alienated, for which compensation has not been made to her. And by section 1495, she may exercise all actions and previous demands as well against the goods of the community as against the personal goods of her husband.

From this examination of the French law it follows that the property of this plaintiff which came to her during marriage, by succession from her mother, being immovable, still belongs to her; that she could alienate it, as she did, with her husband's consent, that he had the management of it, and had a right to retain the avails of the sale, and keep them during the existence of the community, and had a right to the enjoyment of its emoluments; and that on his death, he having received the price of its alienation, she had a valid claim for that price, first to be paid out of the property of the community, and that failing, out of the property of the husband, and that her claim was entitled to priority of payment.

Such would have been the rights of the parties, if both had continued to reside in France.

Are these rights changed by the circumstance of the husband coming to this country and dying here?

That the price of the wife's immovables thus sold and realized by the husband, constituted a valid debt against him by the laws of France, where this marriage took place, admits of no doubt. Is the debt discharged by the husband's coming to this country?

The rule laid down by Parsons on Contracts, 2 Pars. 110, would seem to answer this suggestion. He says: "It is the general rule, both in England and in this country, that the incidents of marriage and contracts in relation to marriage, as settlement of property and the like, are to be construed by the law of the place where these were made; for any different construction cannot be supposed to carry into effect the intentions and agreements of the parties, or to deal with them justly."

Many cases are cited to sustain the text, and among others, those in our own State, of *Decouche v. Savetier*, 3 John. Ch. 190; *Crosby v. Berger*, 3 Ed. Ch. 538, and *De Barante v. Gott*, 6 Barb. 492. These cases hold that where there is an express contract between the parties, that contract will be enforced, and the rights acquired under it maintained and upheld, though there be a change of domicil. Rights dependent on the nuptial contract are governed by the *lex loci contractus*. There would be no difficulty in this case, therefore, in sustaining the rights and claims of the plaintiff, if the provisions of the Code Napoléon had been embraced in an express contract. Some foreign jurists hold that the law of matrimonial domicil attaches all the rights and incidents of marriage to it *proprio vigore*, and independent of any supposed consent of the parties. 1 Boullenois Obser., 29, pp. 741, 750, 757, 758; Huberus, Lib. 1, tit. 8, De Confl. Leg. § 9.

Others hold that there is in such cases an implied consent of the parties to adopt the law of the matrimonial domicile by way of tacit contract, and then the same rule applies as in cases of express nuptial contracts. Dumoulin was the author, or at least the most distinguished advocate, of this doctrine. Story on Conflict of Laws, § 147. This rule has also been adopted by Bouhier, Hertius, Pothier, Merlin, and other distinguished jurists. Id. § 148.

Story, after reviewing the opinions of jurists and the decisions having a bearing upon the question, sums up the whole by saying, in section 159, that perhaps the most simple and satisfactory exposition of the subject, or at least that which best harmonizes with the analogies of the common law, is, that in the case of a marriage, where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, whenever acquired or wherever situate; but that real or immovable property ought to be left to be judged by the *lex rei sitæ*, as not within the reach of any extraterritorial law. When there is any special nuptial contract between the parties, that will furnish a rule for the case, and, as a matter of contract, ought to be carried into effect everywhere, under the general limitations belonging to all classes of contracts.

In this case a new element is introduced by the removal of the husband from France, and consequently a change of his domicile.

In section 161, Story quotes from Bouhier, who lays down the rule in general terms that in relation to the beneficial and pecuniary rights (*les droits utiles et pécuniaires*) of the wife, which result from the matrimonial contract, either express or tacit, the husband has no power by a change of domicile to alter or change them, according to the rule *nemo potest mutare consilium suum in alterius injuriam*, and he insists that this is the opinion of jurists generally. To the same effect that the change of domicile by the husband shall not deprive the wife of any separate interests or separate rights she may have, is the case of *Hartean v. Hartean*, 14 Pick. 181.

And this rule is a reasonable and proper one. As a general rule, the domicile of the wife follows that of the husband, and there is much force in the argument, that in the absence of an express agreement defining the matrimonial rights, the law of the contemplated or any future domicile should govern. But in the case now under consideration, the domicile of the wife has not been changed, and the rights she acquired by the tacit contract made in the matrimonial domicile are not, we think, lost or impaired by the change of the domicile of the husband. Those rights did not mature until the death of the husband. They were postponed till the happening of this event, and then by the law of the matrimonial domicile, by virtue of the tacit contract made between the parties, the right of the wife to a return of all her individual property received by the husband, revives and can be enforced.

We see no reasons of public policy why rights thus secured should not be recognized or enforced, equally as those arising from an express contract. *The judgment must be affirmed, with costs.*¹

COMSTOCK, C. J., DENIO, HORT, and JAMES, JJ., concurred. MASON, J., dissented.

LA SELLE v. WOOLERY.

SUPREME COURT OF WASHINGTON. 1895, 1896.

[Reported 11 *Washington*, 387; 14 *Washington*, 70.]

HORT, C. J.² Appellant, William F. Collins, in a suit brought in King County against the respondent, William La Selle, duly recovered judgment. To this action and judgment the respondent, Marian E. La Selle, wife of said William La Selle, was not a party. Execution issued on said judgment, which was placed in the hands of J. H. Woolery, sheriff of King County, the other appellant. He made a levy upon a piece of real estate situated in King County, of which the paper title was in the name of said Marian E. La Selle. This suit was then brought by the respondents, and thereby they sought to enjoin the sale of the property levied upon, and to have it decreed that such property was not subject to the lien of the judgment.

It was conceded that the property, though standing in the name of the wife, Marian E. La Selle, was the community property of herself and her husband, William La Selle. It was, therefore, under the rule established by numerous decisions of this court, subject to the lien of the judgment against the husband alone if the debt upon which such judgment was rendered was that of the community. It is equally well established by the adjudications of this court that such property was not subject to the lien of such judgment if the debt for which it was rendered was the separate debt of the husband. It must follow that the nature of the debt which was the foundation of the judgment is the material question to be determined upon this appeal. If it was that of the community, the sheriff should have been allowed to proceed to satisfy the judgment by a sale of the property. If it was the debt of the husband alone, the appellants were rightfully restrained from proceeding further against the property in question. The foundation of this judgment was one against the husband alone, made and entered in the State of Wisconsin, and the foundation of that one was a liability incurred by the husband to the appellant Collins in the prosecution of his business as a contractor and builder and proprietor of a sash and door factory, and was for materials sold to him to be used in the con-

¹ *Acc. Kendall v. Coons*, 1 Bush. 530; *Columbia Bank v. Walker*, 14 Lea, 299. — Ed.

² Part of the opinion is omitted. — Ed.

struction of houses and to supply his factory. At the time this liability was incurred, and the judgment in Wisconsin rendered, the respondents were living together as husband and wife in the State of Wisconsin. Afterward they removed from said State, and, from a time preceding the date of the judgment rendered in King County, had been living together as husband and wife in this State. . . .

The substantial question presented by the facts is as to the status of the debt which was the foundation of the judgment in Wisconsin in reference to the property of the husband or husband and wife situated in that State. It appears from the statutes set out in the answer that in that State there is no such thing as community property as understood here, nor is there any such thing as separate property of the husband as defined by our laws. The wife alone could own separate property, and the provisions in relation to its acquisition were substantially the same as in this State. All other property was that of the husband, whether it was acquired in such a manner as to make it under our laws his separate property or that of the community. And all of his property under the laws of that State could be subjected to the payment of debts incurred by him alone. It will be seen from these provisions that a debt incurred by the husband could there be enforced against all of the property acquired by the husband and wife either before or after marriage excepting such as under the laws of that State would be the separate property of the wife. This is substantially the result of the laws of this State as interpreted by former decisions of this court.

In our opinion the comity which one State owes to another goes to the substance rather than the form of things. If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature though it might be called by a different name. In the State of Wisconsin property which was acquired by the joint labors of the husband and wife, though called the property of the husband, was subject to the payment of debts incurred by the husband in the prosecution of business for the support of the family. Property acquired in the same manner in this State belongs to the community, but is subject to a liability incurred by the husband alone in the prosecution of business for the same object. Hence, under the rule above suggested, comity requires that a debt which under the laws of that State could be enforced against property which from the nature of its acquisition would be that of the community in this State, should be here enforced against property belonging to the community.

There is nothing in the policy of our legislation which will prevent the application of the rule above stated to the facts of this case. On the contrary, the general policy of this State upon the question of the liability of property of the community and of the respective spouses for debts incurred by the husband alone in the prosecution of any business is in substantially the same line as that of the State of Wisconsin. But whether it is or not, so long as the rights of the parties are adjudi-

cated under the laws of this State, its citizens have no ground of complaint, whatever may be the result as to those of other States. And since what we have said has been founded upon our statute, and the rights adjudicated thereunder have been in the light of the facts shown by the record, the respondents cannot complain.

The judgment will be reversed, and the cause remanded with instructions to overrule the demurrer to the affirmative defences pleaded in the amended answer.

Rehearing granted.

GORDON, J. A majority of the court are of the opinion that a wrong conclusion was reached at the former hearing.

The case is fully stated in the former opinion, in the course of which opinion the court said: "If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature."

Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this State as against such property (*Harrison v. Sterry*, 5 Cranch, 289; *Wharton*, Conflict of Laws, § 324), we do not think it ought to be extended to property subsequently acquired in this State, although of the "same nature," and this principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale. *McCormick v. Sullivan*, 10 Wheat. 192.

Upon this subject no less a writer than Story has said: "All the authorities in both countries [England and America], so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate." Story, Conflict of Laws, § 428. "Any title or interest in land or in other real estate can only be acquired or lost agreeably to the law of the place where the same is situate." *Id.* § 365.

The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the State where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If by the law of Wisconsin it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce, being by the law of Wisconsin where it arose merely the separate individual debt of the husband, enforceable only against his separate individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of

the real property of the community acquired in this State long after the debt arose and judgment was rendered upon it.

The doctrine of the common law is that: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." Story, *Conflict of Laws* (8th ed.), § 558.

The settled rule is that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent, and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding and the forms of judgment and execution." 2 *Abbott's Law Dictionary*, p. 86.

In the case of *Blanchard v. Russell*, 18 Mass. 1 (7 Am. Dec. 106), the Supreme Court of Massachusetts, speaking by Chief Justice Parker, say:—

"But the courtesy, comity, or mutual convenience of nations, among which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the State in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other State. . . . The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a State other than that in which the contract was made. For the remedy must be pursuant to the laws of the State where it is sought; otherwise great irregularity and confusion would be introduced into the form of judicial proceedings."

The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband. *Brotton v. Langert*, 1 Wash. 73 (23 Pac. 688); *Stockand v. Bartlett*, 4 Wash. 730 (31 Pac. 24). And it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this State.

One result of such limitation would be that the court would be required in every case to resort to the law of the State where the debt arose in order to determine what property in that State would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this State, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment

debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister State where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and controlled by the *lex fori*, and not by the *lex loci contractus*; and to avoid interminable confusion the distinction must be observed.

For these reasons the order and judgment of the Superior Court will be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ., concur.

HORT, C. J. (*dissenting*). The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband residing in a sister State, possessed of ever so much property which, though the title is vested in him, is held for the benefit of himself and wife, and would from the manner of its acquisition be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts which may have been contracted on the faith of the property which he owned by converting such property into cash and removing to this State and investing it in real estate. That the laws of one State should be so construed as to allow a debtor in another, possessed of abundant means with which to pay all of his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion the conclusion reached upon the former hearing was the correct one and should be adhered to.

ANONYMOUS.

COURT OF APPEAL, WIESBADEN. 1841.

[Reported 1 *Seuffert's Archiv*, 57.]

THE COURT. The opinion adopted in the lower court, that the established rights of inheritance of the spouses are to be determined not by the law of their domicile at the time of the ceremony of marriage, but by the law of their domicile at the time of the death of the husband, is not in accordance with the principles hitherto established in practice; and furthermore the established doctrine rather holds that the division of property and rights of inheritance of the spouses, since the choice of domicile depends entirely on the husband, and since the rights founded upon the tacit agreement connected with entrance into the marriage cannot be annulled or limited by the one-sided act of one of the spouses, particularly by change of domicile, should be regulated only by the law of

the domicile at the time of the marriage celebration. *Juristische Zeitung* for Hanover, 1843, Part II. p. 72. So decided by the Court of Appeal, Munich, Nov. 3, 1847; *Blätter für Rechtsanwendung*, Vol. II. p. 92.

It is of no importance that part of the immovable estate is in a country or district by the law of which the rights of the surviving spouse with respect to the children is settled otherwise. The effect of the above rule extends to immovables situated abroad. This is subject to an exception, however, in a case where at the place where they are situated definite prescriptions are established with reference to the inheritance: that it shall pass to absolutely no other heir than the one therein appointed, and an alteration of this provision by consensual agreement is forbidden.

SAMUEL v. ARROUARD.

CIVIL TRIBUNAL OF VERSAILLES. 1893.

[*Reported 21 Clunet, 544.*]

THE TRIBUNAL.¹ The documents produced, which are not disputed, prove that Dame Girard-Kiener and her husband were of Swiss nationality at the time of her decease at Chalon, Nov. 15, 1874. They were married at Lausanne on April 16, 1834, without any preceding marriage contract; and consequently, by the terms of the legislation of the Canton of Vaud (Art. 1085), the matrimonial régime to which they were subject was without community of goods. After having lived for some time at Lausanne the Girard-Kieners went to live at Chalon in the year 1848, and Dame Girard died there on Nov. 15, 1874. At no period of their common life did either of the spouses show an intention of changing nationality. No matrimonial capital was furnished by either of them, and in the course of the marriage neither of them received property by inheritance or by gift. Under these circumstances, and in conformity with Art. 1395 of the Civil Code and Art. 1046 of the Code of Vaud (which both provide that a matrimonial régime once adopted shall not change), the plaintiff claims that the regulation of the succession of Dame Girard and of their common property is governed not by the provisions of the French Civil Code, but by those of the laws of Vaud, at least such as expressly provide for the case.

It is quite evident that the régime without community of goods, as it is practised in the Canton of Vaud, is in no way incompatible with the provisions of the French Law, which equally permits the régime without community of goods, or that of separation of goods. Consequently the administration and distribution of the common property of the Girard-Kieners, which took place on May 13, 1875, under the direction of Deguingaud, Notary at Chalon, between Girard and his two children,

¹ Part of the opinion is omitted. — Ed.

may justly be attacked by Girard, since they were erroneously carried out upon the basis of the French legal community, when they should have been regulated by the law of Vaud. . . .

The defendants claim that in any case the immovable property situated at Chalon, the title of which is in the name of Girard, ought in the settlement of the marital property, in conformity with Art. 8, § 2, of the Civil Code, to be governed by the French law rather than by foreign legislation, and, consequently, to be divided upon the basis of the legal community. But since it has been decided by an unbroken line of cases that agreements which have nothing contrary to French law, to public order, and to good morals, should be executed with regard to movables and immovables alike, and since the provisions of a foreign law excluding from matrimonial community immovable property acquired by the spouses during the marriage is in no way opposed to the general provisions of the French law, which permits the régime without community of goods, no distinction can be made by reason of the nature of the property acquired by the spouses during their marriage. . . .

CHAPTER VIII.

INHERITANCE.

SECTION I.

INTESTATE SUCCESSION.

LAWRENCE v. KITTERIDGE.

SUPREME COURT OF ERRORS, CONNECTICUT. 1852.

[*Reported 21 Connecticut, 576.*]

CHURCH, C. J.¹ The first decree of the Court of Probate appealed from was predicated upon facts essentially as follows, viz., Cephas Pettibone, the intestate, at the time of his death, was an inhabitant of, and had his domicile in, the State of Vermont, and was possessed of an estate there; and there was due to him here, from a citizen of this State, a debt of about one thousand dollars. Original administration upon his estate was granted in the State of Vermont, and was in progress when an ancillary administration was granted in this State. When the decree appealed from was made, there were no unsatisfied debts due from the estate here, or in Vermont, and nothing but a distribution of the estate remained to be done.

The intestate died, leaving brothers and sisters of the whole and half blood; all, excepting the late Augustus Pettibone, Esq., of Norfolk, who was a brother of the whole blood, residing in Vermont, or elsewhere, out of this State; and he had no other heirs at law. By the laws of Vermont, the brothers and sisters of an intestate of the whole and half blood are entitled equally to the estate, under the statute of distribution.

Upon the foregoing state of facts, the Court of Probate for the District of Norfolk was of opinion that the personal estate of Cephas Pettibone — the chose in action of one thousand dollars — should be distributed according to the laws of the State of Vermont; and that this could better be done, and without injury to any citizen of this State, by transmitting the money to the administrator there, and to the jurisdiction of the Court of Principal Administration, than to order

¹ Part of the opinion only is given. — ED.

a distribution of it here. And therefore the decree appealed from was made.

The appellant, who is the representative of Augustus Pettibone, the brother of the whole blood residing in the District of Norfolk, objects to this decree, and appeals from it. He claims that the assets or money in the hands of the administrator here should have been distributed here, and according to the laws of this State, which prefer a brother or sister of the whole blood to one of the half blood.

1. We had supposed that the law of the country of the domicil of an intestate governed and regulated the distribution of his personal estate; and that this was a principle of international law, long ago recognized by jurists in all enlightened governments, and especially recognized by this court in the recent case of *Holcomb v. Phelps*, 16 Conn. R. 127, 133, in which we say that "It certainly is now a settled principle of international law, that personal property shall be subject to that law which governs the person of the owner, and that the distribution of and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicil at the time of his death." *Sto. Conf. Laws*, 403, *in notis*, §§ 480, 465; 2 *Kent's Com.*, Lect. 37; 2 *Kaine's Prin. Eq.*, 312, 326; *Potter v. Brown*, 5 *East*, 124; *Balfour v. Scott*, 6 *Bro. Parl. Cas.* 550 (*Toml. ed.*); *Bempde v. Johnstone*, 2 *Ves.* 198; *Pepon v. Pepon*, *Amb.* 25, 415; *Guier v. O'Daniel*, 1 *Binn.* 349, *in notis*; *Harvey v. Richards*, 1 *Mason*, 381.

It is not necessary that we should now examine the reasons, whether of public policy or legal propriety, which have led the tribunals of civilized nations to relax from antiquated notions on this subject; some of these are well considered by Judge Story, in the case of *Harvey v. Richards*, 1 *Mason*, 381, and by Chancellor Kent, in his *Commentaries*, vol. 2, Lect. 37.

It is true that it is in the power of every sovereignty, and within the constitutional powers of the States of this Union, to repudiate this salutary doctrine in its application to themselves, or to modify it for what they may suppose to be the protection of their own citizens; but without some peculiar necessity, it cannot be supposed that any well-regulated government will do it. It was claimed in argument, in this case, that this had been done in this State, and by the provision of the 49th section of our statute for the settlement of estates (Stat. 357), by declaring that when there are no children, etc., of an intestate, his "real and personal estate shall be set off equally to the brothers and sisters of the whole blood." But it was not the purpose of this provision to disregard the universal and salutary doctrines of the law to which we have referred, but only to regulate the descent and distribution of the estate of our own citizens. This provision of our statute is not peculiar to ourselves; a similar one, we presume, may be found in the codes of other States; at least, imperative enactments exist in every State, directing the distribution of estates; but none of them are intended to

repeal the law of the domicile in its effect upon the personal estate of the owner. The controversy in the case of *Holcomb v. Phelps* arose under the same section of our law as does the one now under consideration, and the result of that case must settle this question, if it be one.

There are cases in which the law of the domicile has been modified or restrained, in its full operation, for what courts have supposed to be the proper protection of the rights of the citizens of their own States; but these are generally confined to cases in which creditors are in some way interested under insolvent proceedings, assignments, or bankrupt laws, and never, we believe, are extended to mere cases of distribution, as here claimed. *Sto. Conf. L.*, 277, § 337.¹

LYNCH v. PROVISIONAL GOVERNMENT OF PARAGUAY.

COURT OF PROBATE. 1871.

[*Reported Law Reports, 2 Probate and Divorce, 268.*]

THE plaintiff claimed probate (as universal legatee) of the will of Francisco Solano Lopez, who died at Paraguay on the 1st of March, 1870. A caveat having been entered by the defendants, they were called upon to propound their interest, and they accordingly filed the following declaration:—

“1. That Francisco Solano Lopez, the deceased in this cause, was a native of Paraguay, and at the time of his death, which took place in Paraguay, on or about the 1st day of March, 1870, was domiciled there.

“2. That by the law of nations, and by the law of England, the succession to the personal estate and effects of the said deceased, wheresoever situate, and also the right to administer to the said estate, is to be governed by the law of Paraguay.

“3. That by a decree of the Government of Paraguay, dated the 4th day of May, 1870, all the property of said deceased, wheresoever situate, is declared to be the property of the nation of Paraguay, and that such decree is valid and now binding and operative by the law of Paraguay.

¹ *Acc. Somerville v. Lord Somerville*, 5 Ves. 749, 786; *Dogliani v. Crispin*, L. R. 1 H. L. 301; *Hewitt v. Cox*, 55 Ark. 225, 17 S. W. 873; *Estate of Apple*, 66 Cal. 432; *In re Afflick*, 3 McArth. 95; *Russell v. Madden*, 95 Ill. 485; *Lewis's Estate*, 32 La. Ann. 385; *Hairston v. Hairston*, 27 Miss. 704; *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596. But see *Succession of Petit*, 49 La. Ann. 625, 21 So. 717. *Contra*, by statute, *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61.

So the widow's allowance is to be governed by the law of her husband's domicile at death. *Mitchell v. Ward*, 64 Ga. 208.—ED.

"4. That by the now existing law of Paraguay, no will or testamentary paper whatsoever of the said Francisco Solano Lopez is entitled to probate, or has any validity whatsoever in England or elsewhere.

"5. That by the now existing law of Paraguay, the said Government of Paraguay, or their officer, or attorney, is entitled to become the sole personal representative in England of the said deceased, and to take the grant of letters of administration in England of his personal estate and effects situate in England.

"6. That Richard Lees, the defendant, is by a power of attorney, duly executed by the President of the Republic of Paraguay on behalf of the said republic, dated the 22d day of December, 1870, duly authorized to oppose the grant of probate of any testamentary document of the said deceased, and the grant of any letters of administration of the estate of the said deceased, to any other person, and to apply for letters of administration of all the personal estate and effects of the said deceased situate in England, to be granted to him under such power of attorney, and that he is by reason of the premises the only person entitled to be constituted the personal representative of the said deceased in England."

To this declaration the plaintiff demurred, and the demurrer came on for argument on the 4th of May, 1871.¹

LORD PENZANCE, having stated the declaration, said: To this declaration the plaintiff has demurred, and the ground of demurrer relied upon is, that the decree upon which the defendants' claim is based is not alleged to have been in force at the date of the testator's death. Some other points were taken in argument raising a discussion of considerable interest; but, on reflection, I am satisfied that the date of the decree relied upon by the defendants is fatal to their claim in this suit. The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicile as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to me well founded. A general statement of the rule of law on this head is to be found in § 481 of Story's Conflict of Laws. He says: "The universal doctrine now recognized by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death." The words "at the time of his death" are here carefully inserted as part of the principal proposition, and a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that those words are not a necessary part of it. But it was ingeniously

¹ Arguments of counsel are omitted. — ED.

argued that the decree in question has by the law of Paraguay a retrospective operation, and that, though the decree was, in fact, made since the death, it has by the law of Paraguay become part of that law at the time of the death. In illustration of this view it was suggested, that if the question were to arise in a court of Paraguay such court would be bound by the decree, and therefore bound to declare the provisions of the decree to be effective at and from the time of the death. This may be so; but the question is, whether the English courts are bound in like manner; or, more properly speaking, the question is, in what sense does the English law adopt the law of the domicile? Does it adopt the law of the domicile as it stands at the time of the death, or does it undertake to adopt and give effect to all retrospective changes that the legislative authority of the foreign country may make in that law? No authority has been cited for this latter proposition, and in principle it appears both inconvenient and unjust. Inconvenient, for letters of administration or probate might be granted in this country which this court might afterwards be called upon, in conformity with the change of law in the foreign country, to revoke. Unjust, for those entitled to the succession might, before any change, have acted directly or indirectly upon the existing state of things, and find their interests seriously compromised by the altered law. As, therefore, I can find no warrant in authority or principle for a more extended proposition, I must hold myself limited to the adoption and application of this proposition, that the law of the place of domicile as it existed at the time of the death ought to regulate the succession to the deceased in this case. Under that law the present defendants have no *locus standi* to oppose any will the testator may have made, and no concern with his estate. The demurrer must therefore prevail.

I will only further observe, that if the decree upon which the defendants rely is one entitled to be recognized and enforced in this country in regard to the personal property of the deceased, the defendants' claim under it will be equally good, whether there is a will or not. It does not devolve upon this court to adjudicate upon the property of the deceased, but only to ascertain whether he has made a good will; and, if not, to grant administration of his effects. The defendants would, in any event, therefore, have to establish their claim under the decree in the proper courts of this country before they can obtain the right to appropriate the property of which the deceased died possessed in England.

If it should there be held that this decree in Paraguay, penal in its character, and made after the death of the person to be affected by it, is one which the English courts will not enforce upon his personal property in this country, this court will have done well in not permitting those who have no interest in the estate to provoke a litigation upon the validity of any will the deceased may have made. If a contrary conclusion should be arrived at, and the personal property of which the deceased died possessed shall be determined to have passed to the de-

defendants by virtue of the decree upon which this decision arises, no will, however made, can operate upon it, and the proceedings in this court can neither prevent nor retard the defendants in the acquisition of their rights.

*The court accordingly pronounced for the demurrer, with costs.*¹

ZAMMARETTI v. ZAMMARETTI.

COURT OF CASSATION, FRANCE. 1894.

[Reported 21 *Clunet*, 562.]

THE COURT. The judgment appealed from finds that by a deed executed on October 6, 1870, before Maître de Madre, Notary, at Paris, Xavier Zammaretti, an Italian subject, gave to his wife, in case she should survive him, all his property both movable and immovable; that Xavier Zammaretti died at Paris, in 1890, and that his widow claimed to inherit, by virtue of the Italian law, a third of his estate, and at the same time claimed the benefit of the gift notwithstanding a provision of the Italian law which forbids gifts between spouses during marriage.

The judgment appealed from held that the gift should be sustained so far as concerns immovable property in France, part of the estate; but declared the same gift null and of no effect so far as the movable property was concerned. The estate consisted of both movable and immovable property. This decision was based on the principle that movable property, both corporeal and incorporeal, follows the law of the legal domicile of the decedent.

Though Xavier Zammaretti lived for a long time in France, where he married and died, he never obtained authority from the government to establish his domicile in France; he failed, therefore, to acquire a domicile there, and the intestate or testamentary succession to his movable estate is therefore not governed by the French law. It remained under the control of the Italian law, which provides (Article 8 of the Preliminary Provisions of the Civil Code) that inheritance and testamentary succession, as to the order of succession and as to the distribution and the intrinsic validity of the provisions, are governed by the national law of the decedent, whatever be the nature of the property and wherever it may be.

The judgment appealed from, therefore, finding that Xavier Zammaretti, an Italian subject, had no legal domicile in France, has rightly refused to apply the provisions of the French law to his movable estate, and has properly applied the Italian law; and has consequently declared

¹ *Acc. In re Aganoor's Trusts*, 64 L. J. Ch. 521. — Ed.

the gift from the husband during marriage of his personal property void. This decision has not violated the articles of the Code cited in the appeal. *Appeal dismissed.*¹

G. v. S.

REICHSGERICHT. 1883.

[Reported 8 *Entscheidungen des Reichsgerichts, Civilsachen*, 145.]

THE plaintiff, a resident of Stockholm, granddaughter and only descendant of the spouses S. of Stockholm who died at Frankfort-on-the-Main, claimed her legal right of succession on the ground of the law of Frankfort-on-the-Main. In answer to the declaration it was pleaded, among other things, that the question should be decided not by the law of Frankfort-on-the-Main but by the provisions of the Swedish law, which differed in some respects as to forced succession; since the spouses S. had not surrendered their Swedish nationality, and though resident in Frankfort had no legal domicil there. That the plaintiff's mother, as her guardian, had renounced the succession to her grandparents at Stockholm by a deed in legal form. The plaintiff replied that renunciation of a right of succession, even if permissible by the Swedish law, was not legal according to the law of Frankfort. Both the defendant's pleas were overruled in the lower courts, and the defendant alleged error.

THE COURT. The right of forced succession, being a law of succession which takes away the free power of disposition of the deceased, is, like laws of succession generally, to be decided not by the law which governs the heirs themselves but rather according to that which governed the deceased. Now the right of forced succession operates to restrain the power of disposition of the deceased; accordingly that law prevails which governs his civil capacity and his right to dispose of his property, to wit, the so-called statute personal. This law, however, in

¹ Acc. 23 Clunet, 662 (Brazil, 16 Mar. '95).

By the Italian law, succession to both personal and real estate is governed by the nationality of the decedent. 22 Clunet, 175 (Ital. Cons. Ct. 31 May, '94). In France this is true of movables. Where the decedent was born and domiciled in France, however, it was held that his movable succession was governed by the French law rather than by that of his nation. 22 Clunet, 628 (Seine, 9 Mar. '95). And where the law of the decedents' own country regulates the succession by the law of the situs, that law will be applied to movables in France. 6 Clunet, 285 (Cass. 24 June, '78). In a case where all the heirs were French, their interests were held to be governed by the French law instead of by that of the decedent. 20 Clunet, 595 (Nice, 6 Mar. '93).

In France succession to immovables is governed by the *lex rei sitæ*. 17 Clunet, 121 (Paris, 31 Dec. '89).

In Germany succession to both movables and immovables was (before the adoption of the Civil Code) regulated by the law of the domicil of the decedent. 13 Clunet, 732 (Darmstadt, 19 Nov. '83). — ED.

the view of the German common law, is not the law of the nation to which the person belongs through his duty of allegiance, but the law of the State to which the person belongs because he has his domicile within its jurisdiction. This is sometimes disputed in theory; but the doctrine, fully supported as it is by the principles of the common law, is not brought in question by the plaintiff in error.

It cannot be alleged as error that in settling the question whether Frankfort was the domicile of the deceased it was not considered whether he was legally permitted to establish a home or only lived there with a residence-card. Domicil as a pure question of fact is quite independent of right to establish a home. Its requisites, an intention to choose a place for a permanent residence and make it the centre of all the relations of one's life, and the execution of this intention by means of appropriate acts, may obviously exist without the legal right of residence. One may have the intention of making his home at a place where he has not the legal right to dwell, so long as he expects that, notwithstanding, there will be no obstacle in the way of his living there. None the less is the execution of this intention possible, so long as no use is made of the legal right of interfering with his further stay in the place. The mere possibility that this may happen puts an end to the existence of a domicile as little as the possibility that one may by his own free will move to another place.

The decision of the question of legal succession according to the law of Frankfort furnishes no cause of complaint to the plaintiff in error.

The objection which the defendant made because of the written renunciation of succession made by the plaintiff's mother, as her guardian, at Stockholm, on December 27, 1859, was rejected by the Court of Appeal; which judged the renunciation according to the law of Frankfort and denied it validity on the ground of the Frankfort Reformation, III. 2, §§ 4, 5; V. 4, § 2.

This decision is to be so far affirmed, as with reference to the question whether a renunciation of succession by an heir in the lifetime of the ancestor is valid and effectual that law is declared to govern which is generally in force for successions; in this case that which prevails at Frankfort, the domicile of the deceased. It is a question in case of the renunciation before the death of the decedent of the succession to him, either of the release of a right already the vested property of the releasor, in which case such a right in the lifetime of the decedent is not consistent with the statutory succession or forced succession; or about the refusal of a future succession, in which case the vesting of the right first takes place at the death of the decedent, and the refusal is null before vesting. The effect of renunciation consists rather in this: that, like a disinheritation, it prevents the vesting of the inheritance in the renouncer, so far as he has renounced.

See Hasse, *Rheinische Museum*, Vol. II. p. 151; Beseler, *Erbverträge*, Part II. Vol. 2, p. 236 ff; *System of German Private Law*, 3d ed. § 140, No. 8, 10; Hofmann in *Grünhut's Zeitschrift*, Vol. 3, p. 650,

657, 660 ff; judgment of the Court of Appeal, Rostock, in its *Entsch.* Vol. 5, p. 371; *Seuffert, Archiv*, vol. 20, No. 150.

The effect of the renunciation, therefore, would touch the property of the renouncer only in so far as it prevented an accession to it; it would touch the inheritance, on the other hand, when it fell to the one to whom it would have fallen if the renouncer had not been at hand. For these reasons, and in accordance with other questions of succession, the legality and effect of a renunciation of the succession during the lifetime of the deceased is to be decided not according to the law which governs the renouncer but according to the law which generally regulates succession, that is, that which governs the personal rights of the deceased. This is still clearer when it is a question about renunciation of a forced succession, by which the decedent would be freed from the restrictions put upon him by the provisions of the existing law of forced succession. The Court of Appeal, therefore, rightly applied not the Swedish law, which unquestionably recognizes the legality of the renunciation, but that of Frankfort.

The application of the law of Frankfort to the alleged renunciation of succession cannot be denied on the ground that it is not certain that at the time of the renunciation, December 27, 1859, the deceased by a change of his domicile to Frankfort had submitted himself to the law of that place. Whether a renunciation of succession in the lifetime of the deceased has legal effect upon the rights of succession which vest at his death is not to be determined according to the law which governs him at the time of the renunciation but by that which prevails at the opening of the succession. The same reasons which are stated above for applying the law ordinarily governing succession to the question of the legality and effect of a renunciation of succession are conclusive when time is considered as well as when place is in question.¹ . . .

SECTION II.

TESTAMENTARY SUCCESSION.

MOULTRIE v. HUNT.

COURT OF APPEALS, NEW YORK. 1861.

[*Reported 23 New York, 394.*]

DENIO, J.² One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the testator should,

¹ See 20 *Clunet*, 197 (*Hamburg*, 11 Nov. '89). — ED.

² Part of this opinion, and the dissenting opinion, are omitted. — ED.

at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament. 2 R. S. p. 63, § 40. The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed, and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed, according to the laws of South Carolina.

Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States and countries according to the laws in force there, are recognized in our courts as valid acts, so far as concerns the disposition of personal property. *Parsons v. Lyman*, 20 N. Y. 103. This is according to the law of international comity. Every country enacts such laws as it sees fit as to the disposition of personal property by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all civilized nations agree, as a general rule, to recognize titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is parcel of the municipal law of the respective countries in which it is recognized, the evidence of which, in the absence of domestic legislation or judicial decisions, is frequently sought in the treatises of writers on international law, and in certain commentaries upon the civil law which treat more or less copiously upon subjects of this nature.

If the alleged testator in the present case had continued to be an inhabitant of South Carolina until his death, we should, according to this principle, have regarded the will as a valid instrument, and it would have been the duty of our probate courts to have granted letters testamentary to the executors named in it. The statute contemplates such a case when it provides for the proving of such wills upon a commission to be issued by the Chancellor, and for granting letters upon a will admitted to probate in another State. 2 R. S. p. 67, §§ 68, 69. These provisions do not profess to define under what circumstances a will

made in a foreign jurisdiction, not in conformity with our laws, shall be valid. It only assumes that such wills may exist, and provides for their proof.

The question in the present case is, whether, inasmuch as the testator changed his domicile after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest, or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in conformity with the law of the testator's domicile, is a "consummate and perfect transaction." In one sense it is, no doubt a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery, to give it vitality. But, until one or the other of these circumstances — namely, the death, in the case of a will, or the delivery, where the instrument is an obligation — occurs, the instrument is of no legal significance. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to induce it with any legal operation or effect. The existence of a will, duly executed and attested, at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy. *Betts v. Jackson*, 6 Wend. 173–181. The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal. *De Peyster v. Clendining*, 8 Paige, 295; 2 R. S. p. 779, § 5;

Bishop v. Bishop, 4 Hill, 138. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the wills executed under the former law, and which failed to conform to the new one, where the testator survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect. 2 R. S. p. 68. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute is not affected by a repeal of the law. *Reg. v. The Inhabitants of Denton*, 14 Eng. L. & Eq. 124, per Lord Campbell, C. J.

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law, before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign State or country, but which failed to conform to the laws of this State, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognize it by the law of comity, just as we would recognize and give validity to a bond reserving eight per cent interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own Constitution guarantees against legislative confiscation. Yet I presume no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfected transaction, so as to create rights which the courts can recognize or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this State, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this State, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity to a will executed in another State, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another State, who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act; and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicil, because he had concluded not to give legal effect, in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction, without success, that we can profitably seek for light in the works of the jurists of the continent of Europe.

The principle adopted by the Surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicil, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much

authority, of quite a different tendency. The result of the cases, I think, is, that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicile of the testator at the time of his death. Thus, in *Grattan v. Appleton*, 3 Story's R. 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicile was to govern in relation to his personal property, though the will might have been executed in another State or country where a different rule prevailed. The judge referred, approvingly, to *Desesbats v. Berquier*, 1 Bin. 336, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English ecclesiastical courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well-considered judgments of these courts. *De Bonneval v. De Bonneval*, 1 Curt. 856; *Curling v. Thornton*, 2 Addams, 6; *Stanley v. Bernes*, 3 Hag. 373; *Countess Ferraris v. Hertford*, 3 Curt. 468. It was for a time attempted to qualify the doctrine, in cases where the testator was a British subject who had taken up his residence and actual domicile in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicile; but the judgment of the High Court of Delegates, in *Stanley v. Bernes*, finally put the question at rest. In that case an Englishman, domiciled in Portugal and resident in the Portuguese Island of Maderia, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The Reporter's note expresses the result in these words: "If a testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts, to the

formalities required by the *lex domicilii*." See, also, *Somerville v. Somerville*, 5 Ves. 750; and *Price v. Dewhurst*, 8 Simons, 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicile, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the Reporters clearly show, that it is the domicile of the testator at the time of his death which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in *De Bonneval v. De Bonneval*, the question was upon the validity of the will executed in England, of a French nobleman who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of *Stanley v. Bernes*, that the law of the place of the domicile, and not the *lex loci rei sitæ*, governed "the distribution of, and succession, to personal property in testacy or intestacy." The Reporters' note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled at his death."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of intestacy. Judge Story says, that the universal doctrine now recognized by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicile of the intestate at the time of his death. Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in *Somerville v. Somerville*, that the rule was that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine whether in a given case there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice-Chancellor, in *Price v. Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases, which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the

question whether he died intestate or not must be determined by the law of the same country." The method of arriving at a determination in the present case, according to this rule, is, to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and consequently that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the foreign jurists, many of whose opinions have been referred to and copiously extracted in the able opinion of the learned Surrogate, if I had convenient access to the necessary books, which is not the case. I understand it to be conceded that there is a diversity of opinion upon the point under consideration among these writers; but it is said that the authors who assert the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix, himself a systematic writer of reputation on the conflict of laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is: "But it may be asked, what will be the effect of a change of domicil after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of his making his will and testament of personal property, which is to govern." Section 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicil to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Tollier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicil of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear, upon the English and

American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile. If the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to the judgment of these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will. . . .

The will under immediate consideration was not, we think, legally executed; and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, C. J., LOTT, JAMES, and HOYT, JJ., concurred.

DAVIES, SELDEN, and MASON, JJ., dissented.

*Judgment reversed.*¹

ROBERTSON v. PICKRELL.

SUPREME COURT OF THE UNITED STATES. 1883.

[Reported 109 United States, 608.]

FIELD, J.² This was an action of ejectment for a parcel of land in the city of Washington, District of Columbia. On the trial the plaintiffs gave in evidence a conveyance of the premises from the United States to one Robert Moore, executed in June, 1800; and then endeavored to trace title from the grantee through a devise in his last will and testament, bearing date in July, 1803. For this purpose they produced and offered a transcript of proceedings in the Hustings Court of Petersburg, in the State of Virginia, containing a copy of the will and of its probate in that court in December, 1804.

By the law of Virginia then in force, that court was authorized to take the probate of wills, as well of real as of personal estate; and

¹ *Acc. Nat. v. Coons*, 10 Mo. 543 (*semble*). The general principle that the validity of a will of personalty depends upon the law of the domicile is well established. *Enohin v. Wylie*, 10 H. L. C. 1; *Macdonald v. Macdonald*, L. R. 14 Eq. 60; *Desesbats v. Berquier*, 1 Binn. 336. The validity of a bequest is judged by the same law. *Jones v. Habersham*, 107 U. S. 174; *Fellows v. Miner*, 119 Mass. 541; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Dammert v. Osburn*, 141 N. Y. 564, 35 N. E. 1088. — Ed.

² Part of the opinion is omitted. — Ed.

when a will was exhibited to be proved, it could proceed immediately to receive proofs, and to grant a certificate of its probate. Within seven years afterwards its validity was open to contestation in chancery by any person interested ; but, if not contested within that period, the probate was to be deemed conclusive, except as to parties laboring at the time under certain disabilities, who were to have a like period to contest its validity after the removal of their disabilities.

The transcript was offered not merely as an exemplified copy of the record of the last will and testament of Robert Moore, and of its probate in the Hustings Court, but also as conclusive proof of the validity of the will, and of all matters involved in its probate. Upon objection of the defendants' counsel, it was excluded, and an exception was taken to the exclusion. The ruling of the court constitutes the principal error assigned for a reversal of the judgment.

We think the ruling was correct. Looking at the transcript presented, we find that it shows only that a paper purporting to be the last will and testament of the deceased was admitted to record upon proof that the instrument and the signature to it were in his handwriting. No witnesses to its execution were called, no proof was offered of the genuineness of the signatures of the parties whose names are attached to it as witnesses, and no notice was given to parties interested of the proceedings in the Hustings Court. As a record it furnishes no proof of an instrument executed as a last will and testament in a form to pass real estate in the District of Columbia. The execution of such a will must be attested by at least three witnesses. It matters not how effective the instrument may be to pass real property in Virginia ; it must be executed in the manner prescribed by the law in force in the district to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States in the Union a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which governs in the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common-law rule prevails on that subject. The Orphans' court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also ; but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property the probate is not evidence of its execution. That must be shown by a production of the instrument itself and proof by the subscribing witnesses ; or, if they be not living, by proof of their handwriting.

So it matters not that the same effect is to be given in the courts of this district to the record of the Hustings Court, which, by the law of Virginia, can be given to it there ; that is, that it is to be received as

sufficient to pass the title to real property situated in that State. The question still remains — is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings Court, and by the law of Virginia cannot be removed, then it should have been proved under a commission, as other instruments out of the State are proved, when it is impossible to compel their production in court.

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia College*, 17 Wall. 521, 529.

It does not appear that the validity of the will of Moore, as probated in 1804 in the Hustings Court of Petersburg, was ever afterwards contested in a Court of Chancery in Virginia. Its probate must, therefore, be deemed conclusive, so far as that State is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind. But no greater effect can be given out of Virginia to the proceeding in the Hustings Court. The probate establishes nothing beyond the validity of the will there. It does not take the place of provisions necessary to its validity as a will of real property in other States, if they are wanting. Its validity as such will, in other States, depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Authority for these views is found in the cases of *McCormack v. Sullivant*, 10 Wheat. 192, and of *Darby v. Mayer*, 10 Wheat. 465. In the first of them it appeared that by the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the court of common pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws; in which case an authenticated copy can be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and this court held that such probate gave no validity to the will in respect to the real property in Ohio, as to which the deceased was to be considered as having died intestate. *McCormack v. Sullivant*, 10 Wheat. at 202, 203. In the second case, which was an action of ejectment for land in Tennessee, the defendant endeavored to trace title to the premises through the will of one Kitts. For that purpose a copy and pro-

bate of the will devising the property were produced in evidence, certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. This court held the record inadmissible, and in its opinion explained the common-law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in existence and could be produced, it was necessary to produce it; and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to; but that, whatever the proof, it was required to be made before the court which tried the cause, the proof before the ordinary being *ex parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate, which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. *Darby v. Mayer*, 10 Wheat. at 468, 469.

The first of these cases shows that the probate of a will of real property in one State is of no force in establishing the validity of the will in another State. That must be determined by the laws of the State where the property is situated. The second case shows that the proof of a devise of land in ejectment in Maryland — and its law obtains in this district — must be made by the production of the will in court, and evidence of its execution by the subscribing witnesses; or, if the will be lost, or cannot be produced, the proof must be made by secondary evidence of its execution and contents.

The plaintiffs contend that they can use the record of the Hustings Court in Virginia as proof of the genuineness of the instrument, and then supplement that proof by parol evidence that the original was executed by three witnesses, and thus establish it as a will sufficient to pass real estate in the District of Columbia. But in this contention they overlook a material circumstance. It is not sufficient to give effect to an instrument as a will of real property that its genuineness merely be established. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character, and, if dead, their handwriting must be proved, as already stated. No other proof will answer; certainly not the probate of the will on *ex parte* testimony by a tribunal of another State or country.¹

¹ The rule here laid down is of general application. The law of the situs of the land governs the methods of executing, proving, and recording a will, so far as it devises land. *Callaway v. Doe*, 1 Blackf. 372; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Lapham v. Olney*, 5 R. I. 413. The same law governs the validity of the devise. *Hobson v. Hale*, 95 N. Y. 588; *Lewis v. Doerle*, 28 Ont. 412; the nature of the title conveyed: *Pratt v. Douglas*, 38 N. J. Eq. 516; the right of devising as against heirs:

CARPENTER v. BELL.

SUPREME COURT OF TENNESSEE. 1896.

[Reported 96 Tennessee, 294.]

BEARD, J. The will which is the subject of this litigation was executed by a *feme covert*, who was, at the date of its execution as well as at the time of her death, a resident of the State of Kentucky, and by it the testatrix undertakes to dispose of real property in this State. Notwithstanding all the formalities required by our statutes to validate such a will have been observed in this case, yet it is insisted that, as the law of Kentucky incapacitates a married woman from making a disposition of such property by last will and testament, this incapacity follows the instrument into this State and defeats the devise of realty located here. The bill in this cause is filed on this theory.

This contention is unsound, as is well settled by the authorities. As to immovable property, the rule is that the *lex rei sitæ* governs as to the capacity or incapacity of the testator, the extent of his power of disposition, and the forms and solemnities necessary to give the will its due authority and effect. Pritchard on Wills, § 53; Williams v. Saunders, 5 Cold. 60; Rorer on Int. Law, 288, note; Story on Con. of Laws, § 474; White v. Howard, 46 N. Y. 144; Ford v. Ford, 70 Wis. 19.

The result is, that the decree of the Chancellor dismissing complainant's bill will be affirmed with costs.¹

MAYOR, ALDERMEN, AND CITIZENS OF CANTERBURY
v. WYBURN.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1894.

[Reported [1895] Appeal Cases, 89.]

LORD HOBHOUSE.² On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne, and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—

“ I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand

Eyre v. Storer, 37 N. H. 114; the effect of the will upon after-acquired land: Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Wynne v. Wynne, 23 Miss. 251.

In several States, by statute, a will good where made will pass land. Irwin's Appeal, 33 Conn. 128; Lyon v. Ogden, 85 Me. 374, 27 Atl. 258.

A chattel real is to be treated like land in this respect. Pepin v. Bruyère, [1900] 2 Ch. 504; De Fogaasieras v. Duport, 11 L. R. Ir. 123. — Ed.

¹ Acc. Holman v. Hopkins, 27 Tex. 38. — Ed.

² The opinion only is given. — Ed.

pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beane Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000 to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the court to answer; and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to prevent such a testamentary gift. He adds:—

"If it had been shown that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000 in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shown. It appears that the corporation could lawfully have expended £10,000 in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the full court varied the decision of the first court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They consider that as the £10,000 is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course, there is no doubt of the competency of the English legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into court for decision.

It appears to their Lordships that the arguments relied on by the full court, and by the respondents' counsel at this bar, err in exaggerating

the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. II. c. 36, passed in the year 1736: "An act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the act; but it is manifest from the preamble and the operative parts of the act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. II. c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherision of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class — at that date a much larger relative class than now — of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *Attorney-General v. Stewart*, 2 Mer. 143, decided by Sir

William Grant in the year 1817. He considered that both the mischief struck at by the act, and the methods prescribed for lawful gifts, were of a local character peculiar to England. Therefore, he held that the act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation, *Whicker v. Hume*, 7 H. L. Rep., 124, it was applied to a gift of land in New South Wales.

In that state of the law the present act of 1888 was passed. By sect. 4, sub-sect. 1, it is enacted thus:—

“Subject to the savings and exceptions contained in this act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this act, and unless so made shall be void.”

The requirements of the act are substantially those of the act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurers. By the interpretation clause the term “assurance” includes a will. This act therefore, subject to some special exemptions, prohibits “death-bed” gifts as strictly as does the earlier act. But it is impossible to suppose that the English legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the Colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the Colonies by the new statute. Moreover, Sir Wm. Grant’s other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word “assurance” in the act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is, how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the act. They have reached the conclusion that this will is not invalidated by sub-sect. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian court of justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General v. Mill*, 2 Dow & Cl. 393. In that case the testator was a native of Montrose. He spent many years in the island of Carriacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scottish trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Carriacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England, and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery, and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotsman, and that the case decides that a bequest of money in a Scottish will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scottish domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the counsel for the Attorney-General who was contending for the validity of the gift did not suggest any other domicile. The word "domicil" occurs only twice in the reports of the case. In one of them, 2 Dow & Cl. 394, the reporter uses a casual expression to the effect that on leaving Carriacou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scottish origin of the testator, and his connection with Montrose, were only used as arguments to show that he contemplated the purchase of land in Scotland—a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Story, J. (*Conflict of Laws*, § 446), and Mr. Westlake (*Private International Law*, § 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the full court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the courts below that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships

have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.¹

IN RE PIERCY.

CHANCERY DIVISION. 1894.

[Reported [1895] 1 *Chancery*, 83.]

BENJAMIN PIERCY by his will, dated December 5, 1883, devised and bequeathed all his real and personal estate wheresoever to trustees to sell and convert into money all such estates, to invest the proceeds in English securities or land, and to apply the income for the benefit of persons named, and for charity.

An order for administration was made, which, among other things, directed "an inquiry what was the testator's estate and interest in lands situate elsewhere than in England, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator was the absolute owner of a large extent of land in Sardinia. The opinions of a number of Italian advocates were taken as to the validity and effect under Italian law of the devise contained in the will as regarded land in Italy.

The following provisions of the Italian Civil Code were the most material:

"i. Preliminary directions as to the interpretation and application of the law in general.

"Art. 8. Successions by law or under testamentary disposition, whether as regards the order of succession, or as to the measure of the rights of succession, or the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question, whatever may be the nature of the property, or in whatever country it may be situated.

"Art. 9. . . . The substance and effect of testamentary dispositions are regulated by the national law of the persons making them. . . .

"Art. 12. Notwithstanding the provisions of the preceding articles, in no case shall the laws, acts, or judgments of a foreign country, nor private dispositions or agreements, derogate from the prohibitive laws of the kingdom concerning either the persons, the property, or the acts; nor from the laws in any way concerning public order and morality (*il buon costume*).

¹ *Acc. Cram v. Bliss*, 47 Conn. 592; *Healey v. Reed*, 153 Mass. 197, 26 N. E. 404. — Ed.

"ii. Civil Code.

"Art. 899. Any condition imposed upon an heir or legatee, no matter how expressed, that he is to retain the property, and hand it over to a third party, is a trust substitution. Such substitution is forbidend.

"Art. 900. The invalidity of the trust substitution does not affect the validity of the institution of the heir or legatee to which it is attached; but it invalidates all the substitutions, even those of the first degree."

This code came into operation in 1866, and made very considerable changes in the laws of Italy previously in force as to land.

In 1889 the executors mortgaged a part of the testator's land in Sardinia to an Italian bank for £20,000. They afterwards sold other portions of the land. Proceedings were also taken in the Italian court with reference to the registration of the testator's property in Italy, for the purpose of ascertaining the duty to be paid thereon according to Italian law.

At the time when this summons was heard, the testator's brother and sister were both dead.¹

NORTH, J. (after stating the provisions of the will, as to which he said no difficulty could arise with respect to the testator's English property, or property which was to be dealt with according to English law, referred to some of the clauses of the Italian Code and the opinions of the Italian advocates and to the facts, and continued):

The question is, What is the position of matters as regards the real estate in Sardinia? It is not necessary for me to decide the question whether, under Italian law, the trustees take "as heirs," or whether the testator's children and brother and sister take "as heirs," because *quâcunque viâ* the will is good. If the trustees take as heirs, then everything beyond is "trust substitution," which would not be good according to Italian law, but the gift to the heirs would stand. If, on the other hand, as I think, the trustees are not the heirs, but the testator's children and brother and sister are the heirs, then, in my judgment, according to the preponderating weight of opinion, coupled with the evidence derived from what has actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in Sardinia without any interference on the part of the persons beneficially interested in it. Therefore the direction given by the will to the trustees to sell the estate is perfectly good according to Italian law.

Then the next question is as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land; it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the

¹ The statement of facts is condensed from that of the Reporter, and arguments of counsel are omitted. — Ed.

Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law.

Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The testator has directed that the proceeds of the sale of the land — that is, money to be obtained by the English trustees — is to be received by them, to be invested upon English securities, and then to be held by the trustees upon the trusts declared by an English will in favor of English beneficiaries. No one suggests that there is anything in Italian law forbidding this. It is, indeed, said by one of the Italian advocates that the land is the “patrimony,” and that, when the land is sold, the proceeds of sale — the money — is still the “patrimony.” What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator’s will, because the disposition is good according to English law, and is in no way at variance with Italian law, — meaning now by “Italian law” not merely anything which is expressed in the Italian Code, but anything contrary to “good custom” (whatever that may mean), — for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also.

Then the only question remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator’s Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place. I will take, first, the case of the testator’s widow. It seems to me clear that, according to Italian law, she is a “usufructuary,” in the sense that the disposition in her favor for life is perfectly good, and that the gift to the testator’s children and brother and sister, subject to that usufruct, is a good disposition.

Then comes the question of the "trust substitution"; and as to that, I come to the conclusion upon the evidence that the property is unconverted during that limited period. The Italian law applying, there can be no "trust substitution," and, that being so, the attempt to settle the shares on the children and the brother is not valid. As regards the sister, there is no question, because she takes absolutely in any case. As regards the children, to the extent of one moiety of their shares, and the brother as to the whole of his share, there is an attempt to settle. With the exception of the heir at law, Robert Charles Piercy, and the brother (who is dead), none of these persons raise any question. According to the Italian law they take absolutely, and the trusts over are ineffectual; but with those two exceptions they all say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income to arise from the proceeds of the conversion directed by the will will go after the conversion has taken place." There is nothing, in my view, contrary to Italian law in their saying that they wish their shares of the income of the unsold land to be applied in the same way as if they were shares of the income arising from the proceeds of sale after the conversion had taken place. The heir at law, however, does not elect or waive any right which he may have, and it is unnecessary for me to decide anything as to his share at present. So long as he lives, and the land remains unsold, he will, of course, be entitled to receive the income of his share, whether the trusts in favor of his children are good or bad, and no question between him and his children, or any other person, can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children. But it is possible that he may die while part of the land remains unsold, and the question may then arise between him and his children. Any directions, therefore, which I now give must be without prejudice to any question between Robert Charles Piercy on the one hand, and, on the other hand, any person who may claim upon his death to be entitled to his one-eleventh of the income to arise from any part of the Italian property then remaining unsold, until the conversion thereof.

The question as to the brother's share of the income of the unsold land must be left open in the same way; as he has died recently, and although his representatives are before the court, and bound by my decision on the main questions, they are not prepared to consider or discuss this subordinate question at present; and possibly it may never be raised.¹

¹ *Acc. Ford v. Ford*, 80 Mich. 42; *Jenkins v. G. T. & S. D. Co.*, 53 N. J. Eq. 194, 32 Atl. 208; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413; *Ford v. Ford*, 70 Wis. 19.

So of a bequest to be sent into another State and there held in trust. *Sickles v. New Orleans*, 80 Fed. 868; *Vansant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424. — ED.

STAIGG v. ATKINSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 144 Massachusetts, 564.]

HOLMES, J. This is an action brought by a widow to recover one-third of the proceeds of land in Minnesota formerly belonging to her husband, and sold without prejudice. The defence is, that she is barred by having accepted the provisions of her husband's will. The husband made a will while domiciled in Rhode Island, providing for the plaintiff, but not declaring the provision to be in lieu of dower, and then changed his domicil to Massachusetts, where he died. If he had died domiciled in Rhode Island, and the land had been situated there, the provisions of the will would not have prevented the plaintiff from recovering dower; and it has been decided, in a case between the same parties, that the change of domicil did not affect her right in Rhode Island land. *Atkinson v. Staigg*, 18 R. I. 725. If he had been domiciled and had made his will in Minnesota, the plaintiff would have been entitled by statute to the one-third which she claims; and, as there is no statute to the contrary, the provisions of the will would not have put her to an election. Gen. Laws of Minn. 1875, c. 40; *In re Gotzian*, 34 Minn. 159, 163, 164; *Reed v. Dickerman*, 12 Pick. 146, 149; *Ellis v. Lewis*, 3 Hare, 310. If, finally, the land had been situated in Massachusetts, and the will executed here, the plaintiff would have been compelled to elect between her dower and the will. Pub. Sts. c. 127, § 20; St. 1861, c. 164, § 1. So far, there is no dispute between the parties.

On the foregoing statement, it is obvious that the defendant cannot prevail, unless the rule which would govern if the land lay here also governs the present case. It is contended that that rule does govern, on the ground that the Massachusetts statute is a statute of construction, reading a clause of universal application into the will, to the effect that the provision made for the widow is in lieu of dower or substituted statutory interests in all lands, wherever situated; that the will is to be construed by the law of the domicil of the testator at the time of his death; and that, if the will so construed makes an acceptance of its provisions a waiver of dower, etc., the law of Minnesota would enforce the election made by such acceptance. *Washburn v. Van Steenwyk*, 32 Minn. 336.

But we cannot admit that a rule of construction, properly so called, not known to the law of the party's domicil when he made his will, is necessarily to be imported into it by reason of his dying domiciled elsewhere. For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances. We are speaking only with reference to a case like the

one before us, not to a question like that in *Harrison v. Nixon*, 9 Pet. 483, 504. The testator was at liberty to make his gift to his wife in lieu of, or in addition to dower, as he saw fit. Which it should be, he had to consider, if he ever considered it, when he drew his will. He drew his will under a system by which the gift was in addition to dower unless he expressed the contrary, and he did not express the contrary. We are at a loss to see why his words should be held to acquire a new meaning upon his moving into a State where testamentary gifts are in lieu of dower unless shown to be in addition to it. *Atkinson v. Staigg*, *ubi supra*; *Holmes v. Holmes*, 1 Russ. & Myl. 660.

In view of our construction of the Massachusetts statute, it is not necessary to consider what was the effect of moving into Massachusetts with regard to Massachusetts land. The plaintiff has never made any claim upon it. See *Shannon v. White*, 109 Mass. 146. Neither need we pass upon the plaintiff's argument, that the general law of Minnesota should be accepted here as determining the construction of the will, so far as concerns the effect of accepting its provisions upon the plaintiff's right to Minnesota land. It would follow from that argument that the plaintiff would have been barred of her dower in the Massachusetts land, even if the testator had not moved from Rhode Island.

The case of *Jennings v. Jennings*, 21 Ohio St. 56, relied on by both sides, was the case of a West Virginia will, giving the wife certain interests in land in Ohio, and it was intimated that, with regard to Ohio lands, she was put to her election between the will and her dower, although West Virginia preserved the common law rule allowing her to claim dower in addition to what was given by the will. We understand this case to go on the ground that the law of the place of the land given to the widow by the will was to determine whether she was put to an election or not, at least with regard to land in the same jurisdiction, claimed outside the will. Thus construed the case helps neither party. The case of *Washburn v. Van Steenwyck*, 32 Minn. 336, which was put in evidence, is opposed to the plaintiff's contention. See *Van Steenwyck v. Washburn*, 59 Wis. 483, 510.

But we need not pursue this branch of the case further, because, in our opinion, the Massachusetts statute does not purport to affect lands outside the State, either by way of construction or otherwise.

The language of the Pub. Sts. c. 127, § 20, is as follows: "A widow shall not be entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears by the will to have been the intention of the testator." In the St. of 1861, c. 164, § 1, the language is: "If she makes no such waiver she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." Both of these acts, in form, are directed at dower, not at the construction of wills. The statutes give the widow dower: Pub. Sts. c. 124, § 3; Rev. Sts. c. 60, § 1; and allow her six

months in which to waive the provisions made for her by will. Pub. Sts. c. 127, § 18; St. 1861, c. 164, § 1; Rev. Sts. c. 60, § 11. They then go on to say that she cannot have her dower unless she waives the will, but add that the husband may make his bounty an addition to her dower if he sees fit.

No doubt the statute was intended to change the common law rule. But the fact that it approaches the subject from the side of dower, and not from the side of the will, shows that it was only intended to operate with regard to Massachusetts lands, whether described as a statute of construction or as a statute relating to dower. Of course, Massachusetts would not attempt to legislate concerning dower in another State. Taking the view which we have expressed, we have not considered whether the statutory one-third in fee given by the law of Minnesota would be included under the word "dower" in our statute.

It was suggested, for the defendant, that the widow could not claim under the will in one jurisdiction and against it in another. But, on our construction of the will and the Massachusetts statute, she does not claim against the will by claiming her third of the Minnesota land outside of it.

We are of opinion that the plaintiff's interest is bound to contribute to the payment of debts secured by mortgage upon the Massachusetts lands. By the old law, until changed in England by the St. of 17 & 18 Vict. c. 113, if other land was charged with the payment of debts, it had to exonerate land which the testator had mortgaged. And this rule was not based upon the fact that the devise of the mortgaged land was specific, as it would have been even if residuary, or upon any notion of the intention to be drawn from the will; undoubtedly, land not passing by the will, but acquired and mortgaged after the will was drawn, would have been exonerated. The rule was put upon the ground that the debt was a general debt, like any other, and the mortgaged land only a security, and therefore that the funds liable for general debts must pay it. *Bartholomew v. May*, 1 Atk. 487. *Tweedale v. Coventry*, 1 Bro. C. C. 240; *Serle v. St. Eloy*, 2 P. Wms. 386. See *Hewes v. Dehon*, 3 Gray, 205, 207; *Plimpton v. Fuller*, 11 Allen, 139. It followed that, when other land and the mortgaged land were both charged together, they were held to contribute ratably. *Carter v. Barnadiston*, 1 P. Wms. 505; *Middleton v. Middleton*, 15 Beav. 450; *Harper v. Munday*, 7 DeG. M. & G. 369. And the same principle would apply when all the lands are charged by statute instead of by will.

By the Minnesota statute, the plaintiff's interest is "subject in its just proportion with the other real estate for such debts of the deceased as are not paid from the personal estate," so that, apart from the will, the plaintiff's one-third would stand no better than the other two-thirds. Taking into account this and the general course of legislation which makes land liable for debts, we think that it would be too artificial to interpret the testator's general direction to pay debts as

indicating an intent to charge the interests passing by the will in exoneration of the plaintiff's one-third, even as against residuary devisees. *Hewes v. Dehon*, *ubi supra* (see *Harris v. Watkins*, Kay, 438) although we assume that the residuary devise was not specific, so far as it affected the Minnesota land, as it was not with regard to the land in Massachusetts. *Blaney v. Blaney*, 1 Cush. 107; *Thayer v. Wellington*, 9 Allen, 283, 296. The plaintiff prevails upon a somewhat technical principle, and hardly can complain if she is held to stand upon the footing on which the Minnesota statute meant to put her:

*Judgment for the plaintiff for \$2,205.69.*¹

CAMERON v. WATSON.

HIGH COURT OF ERRORS AND APPEALS, MISSISSIPPI. 1866.

[Reported 40 Mississippi, 191.]

HANDY, C. J.² This is an appeal from the Probate Court of Bolivar County. An issue of *devisavit vel non* was made up in that court on the petition of D. S. Cameron, executor of George G. Torrey, deceased, filed to contest the validity of the will of Mrs. Frances M. Torrey, who was the wife of said G. G. Torrey, and which was propounded for probate in the said court. The issue was made up, and tried before a jury, who found a verdict establishing the will; and a motion to set aside the verdict and grant a new trial was overruled by the court, and a bill of exceptions taken thereto.

¹ A will of personal property is to be interpreted, in the absence of strong evidence of a contrary intention, according to the law of the domicile. *Yates v. Thompson*, 3 Cl. & F. 544; *Harrison v. Nixon*, 9 Pet. 483; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758; *Lincoln v. Perry*, 149 Mass. 368; *Adams v. Farley* (Miss.), 18 So. 390; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. 252; *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156; *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *Gowan v. Gowan*, 17 Scot. Jur. 215. This is so held even where the will was made abroad in the language of the foreign country. *Caulfield v. Sullivan*, 85 N. Y. 153.

The same rule is generally followed in interpreting a devise of real estate. *Guerard v. Guerard*, 73 Ga. 506; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673; *Ford v. Ford*, 70 Wis. 19. *Contra*, *Yates v. Thompson*, 3 Cl. & F. 544, 588 (*semble*); *Jennings v. Jennings*, 21 Oh. S. 56.

Where the courts of the domicile have interpreted the will, courts in other States should therefore follow the interpretation. *White v. Keller*, 68 Fed. 796; *Ford v. Ford*, 80 Mich. 42. But see *Appeal of Clarke*, 70 Conn. 195, 39 Atl. 155; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210.

If the testator changes his domicile before his death, the will is to be interpreted by the law of his domicile at the time the will was made. *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Atkinson v. Staigg*, 13 R. I. 725; 13 Clunet, 605 (Germany, 10 Feb. '85).

When according to the intention of the testator or according to the law governing the dispositions of the will a legatee must elect between the provisions of the will and his rights outside the will, election once made at his domicile will be everywhere effectual. *Washburn v. Van Steenwyk*, 32 Minn. 336; *Wilson v. Cox*, 49 Miss. 538. — Ed.

² The opinion only is given. — Ed.

It appeared in evidence that an antenuptial contract had been entered into between the said G. G. Torrey and the testatrix (then Mrs. Frances M. Walker), dated November 5, 1857, which recited that the said Frances was seised and possessed of a large and valuable estate, real, personal, and mixed, situate and being in the State of Arkansas, and that said Torrey was seised and possessed of a considerable estate in the State of Mississippi; and that a marriage was intended shortly to be had and solemnized between the said parties, and that it was agreed by them, that, notwithstanding said marriage, they should have no claim whatever, the one upon the aforesaid separate estate of the other, or upon the rents, issues, and profits thereof, but the same should remain, continue, and be to them respectively and severally, or to such uses as they should think fit severally to appoint; and therefore the said Frances, with the consent of said Torrey, conveyed all her estate in the State of Arkansas, of what kind soever, and wherever situated, to Gaines in trust, to permit her to keep and enjoy the said estate, with the rents, issues, and profits thereof, to her sole and separate use, or to the use of such person or persons as she, by writing under her hand, or by last will and testament, may appoint, and that said Torrey should not intermeddle therewith; and that the same or any part thereof should not be liable to his control, debts, or disposal, but should remain wholly in the power, and at the disposal of the said Frances; and in further trust, that the said trustee would from time to time convey said estate, or any part thereof, to such persons as she should appoint by writing under her hand, or by an instrument in the nature of a last will and testament, with full power on her part, should said estate, or any part thereof, be sold during her life, and appointed by her to be conveyed, to receive and dispose, for her own proper use, of the moneys arising from such sale or sales, and that said Torrey should not intermeddle therewith, and that the same should not be liable to his control, debts, or disposal, but should remain wholly in her power and disposal, to use as she pleased during life, and to dispose of at her death by last will and testament, or an instrument of appointment in the nature thereof. And the said Torrey thereby covenanted that her estate, and all the income, rents, profits, and proceeds thereof, should at all times thereafter remain and be, to and for the uses and purposes before expressed, and that said Frances might from time to time dispose of, according to her will and pleasure, said increase, rents, income, and profits, and her estate as therein provided for. And the said Frances released all claim on the estate of said Torrey.

This contract describes the said Torrey as being of the county of Bolivar, State of Mississippi, and the said Frances as being of the county of Chicot, in the State of Arkansas; and it was duly recorded in the proper offices in Bolivar County and in Chicot County.

The will propounded purports to be an instrument of appointment in the nature of a last will and testament, made in virtue of the foregoing

deed of settlement, and bears date 25th March, 1861; and its execution and publication in Chicot County, Arkansas, and the attestation of the subscribing witnesses, so as to make it a valid will both as to real and personal estate, were duly proved. It was admitted, on the trial, that G. G. Torrey and Frances M. Torrey had no issue born of this marriage; that she had no child at the time of the marriage to Torrey; that, when the paper propounded as a will was executed, she resided in this State; and that at the date of the execution of that paper, and when she died, she was the wife of G. G. Torrey; that he survived her, and that he resided at the time of his marriage with Frances M. Torrey, in Bolivar County in this State, and continued so to reside up to the time of his death.

It is conceded, by counsel for the appellant, that the antenuptial contract in this case conferred on Mrs. Torrey the power to dispose of her separate property, by will or otherwise, according to the provisions of that agreement; but it is insisted that her power to do so was limited by the terms of that instrument to her separate property in Arkansas, and to the "income, issues, rents, proceeds, and profits" thereof, and that she had no power, under the agreement or otherwise, to dispose of real or personal property in this State; that, as it was not shown that there was any property in this State that she had the power to dispose of, under the agreement, the will should not have been admitted to probate in this State for any purpose.

This position cannot be maintained to the extent stated. It appears, by the evidence, that Mrs. Torrey had her domicile in this State, from the time of her marriage to G. G. Torrey to the time of her death, and that she died here. The general rule is, that the capacity of a testator to make a will, and the rules regulating the disposition of personal property, depend on the law of the domicile; and, to that extent, that the matter of probate belongs to the tribunal of the domicile; where, therefore, the testator has, by law, the general power of disposition by will, it is immaterial, with reference to the question of probate, whether there was property in this State to be affected by the will or not; for, in such a case, the matters for determination would be, whether the testator was competent, by our laws, to make a will, and whether it was executed according to those laws. If these facts were found in favor of the will, it would, of course, be admitted to probate here; and it would affect all personal property embraced in it, wherever situate, though it would not convey real estate situate in another State, unless executed according to the laws of that State.

This is the rule in cases where a general power of disposition by will exists. Does a different rule prevail where the power of disposition is limited to particular circumstances or conditions on which its exercise depends?

When a will is propounded, in such a case, the court finds that the party had not the general power to make it, and that its validity depends on a special grant of power to make it, under particular

circumstances; and the question must necessarily arise, whether those circumstances exist. In this case, the power was not general, but special, and restricted to property in Arkansas and its proceeds. The first question, then, that must arise on the application to probate, would be as to the competency of the testatrix to make a will, and it would be found that that power was derived solely from the antenuptial agreement, and was limited by that agreement to her property in Arkansas and its proceeds. The court would find, on examination of that instrument, that the testator was empowered to dispose of her lands and personal property in Arkansas, and that the will had been executed and was proved according to the formalities required by our laws. It would have jurisdiction, by reason of the domicile, to give full effect to the will as to the personal property in Arkansas, embraced in the deed of settlement, wherever it might subsequently be removed, and the proceeds of the real and personal estate embraced therein, wherever situate; and, of course, the probate would be granted. The probate, though general, would give effect to the will only so far as the testator had power, by virtue of the antenuptial agreement, to dispose of the property mentioned in it.

It is clear, therefore, that the court had jurisdiction to grant probate of the will as to the personalty and the proceeds of the lands mentioned in the deed, wherever they might be found; and that it is no objection to its exercise, that the property was not in this State.

It is next objected that the probate was general, and that it did not restrict the operation of the will to the property in Arkansas, and its rents, issues, profits, and proceeds.

But this is immaterial. The propriety of the probate must be tested by its legal effect; and that clearly was confined to the specific property mentioned in the deed of settlement, and the rents, issues, profits, and proceeds of it. When a will is propounded for probate, devising lands in another State, and personalty, it is customary and proper to admit it to probate generally, though it may not be executed in form, and cannot have the effect to convey lands in another State, as required by the laws of that State. So, when a will contains dispositions, some of which are valid, and others illegal and void, if the will be executed and proved according to the requirements of law, it should be admitted to probate as a duly executed and established will, leaving its legal effect to be afterwards determined. *Lusk v. Lewis*, 32 Miss. 300. And this is especially the case in the trial of an issue of *devisavit vel non*; for such an issue involves no other questions but the competency of the testator to make the will, and whether the instrument was executed with all the formalities required by law, and in all respects under such circumstances as to make it the free and true last will and testament of the testator. Questions of its construction and legal effect are plainly not embraced in such an issue, and should be left for subsequent adjudication.

The last ground of error insisted on is, that the instructions of the

court were contradictory to each other, so that the jury were left without any proper rule to guide them in determining the issue.

There is no error in the instructions except in the second, and that was given at the instance of the appellant, and he cannot complain of it. But no injury was done by it, for the verdict was correct, notwithstanding the erroneous instruction. In such a case the error in the instruction is not ground for granting a new trial, where it is manifest that the verdict was correct, upon the facts appearing in the record. *Fore v. Williams*, 35 Miss. 533.

Let the decree be affirmed, with costs.

IN RE MARTIN.

COURT OF APPEAL. 1900.

[*Reported* [1900] *Probate*, 211.]

APPEAL from the judgment of Sir F. JEUNE, President, allowing probate of a will.¹

LINDLEY, M. R.² The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognized in this country are part of the law of England; and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicile of the testatrix when she died. The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman*, 10 Moo. P. C. 806; see pp. 359 *et seq.*; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; and *In re Trufort* (1887), 36 Ch. D. 600. In each of the last two cases a foreign court had determined the domicile, and the English court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the

¹ The statement of facts, and the judgment of Sir F. JEUNE, are omitted. — ED.

² Part of the opinion is omitted. — ED.

English court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made, and on its subsequent revocation if that question arises. These questions may or may not turn on the domicile of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicile may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns.

By whatever court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicile, must be considered. If this view be ignored, the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be: 1 Jarman on Wills, c. 7; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend on the English view of his domicile. It would be useless, and, indeed, entirely misleading, to ask a French expert what effect the French law would give to an English marriage, without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicile of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial. As already stated, the will was made in England by a Frenchwoman in the French language, and was a holograph will valid by the law of France whether she was then domiciled in England or France. It was made in 1870. She was in service in England, and this by French law rendered her domicile (in the French sense) English at that time. She afterwards set up a laundry business in London. Her principal establishment was therefore here, and, according to French law, she was clearly domiciled (in the French sense) in England. In May, 1874, she married a French refugee known by the name of Martin. He came over to this country in 1868, and made a living by

teaching French. There was no settlement, or anything in the nature of a settlement. The marriage was celebrated by a French Roman Catholic priest in a Roman Catholic church in the presence of a registrar. At the time of the marriage both the man and the woman signed a declaration stating that they were both *domiciliés* in London. They lived together in London for some years and carried on the laundry. In 1881, 1884, and 1888, leases of the laundry house were granted to the husband. In 1890 the husband and wife separated; he assigned the leases to her and returned to France, where he has ever since lived and lives now. His wife remained here and continued to carry on the laundry business until her death in January, 1895. It was believed that she had died intestate, and her brother obtained letters of administration to her estate. The will, which had been sent to France in 1870 and had been deposited with a notary, was brought forward recently by the testatrix's sister, who was constituted by it her residuary legatee. At her instance the letters of administration have been revoked, and probate of the will has been granted. The will has been judicially recognized as valid in France. But as the proceedings there were *ex parte*, I attach little importance to this fact, although no appeal has yet been made to set aside the order so obtained.

The learned President decided, and, in my opinion, rightly decided, that the domicile of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agreed that the will was valid when made. They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married, they differed as to the consequences. MM. Gaustalla, Gorostazu, and Mesnil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astoul, when first called, stated that the marriage did not revoke the will; that it depended on nationality, not domicile, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial *régime* by the spouses.

All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England, and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property, involves, and in a case like this cannot be severed from, English views of domicile. The learned Presi-

dent came to the conclusion that the domicile of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law, and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law, but part of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and the French experts should have been told so, and should have been directed that their assumption of an English domicile was inadmissible. It is plain from their evidence that, according to French law, the domicile (in the French sense) of both husband and wife was in England and not in France, both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct; but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicile.

I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicile of origin in France. According to English law, the burden of proving that he lost that domicile and acquired an English domicile is on those who assert that he did so. Further, the domicile to be acquired must be domicile, not in the French sense, but in the English sense. The experts all tell us that he lost his French domicile, in the French sense, by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicile in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently, or for an indefinite period: see the authorities collected in Dicey's *Conflict of Laws*, pp. 104 *et seq.* I cannot come to the conclusion that this intention is proved. . . .

The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial *régime* the parties intended

to adopt. It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. The authorities will be found collected in Foote's International Law, 2d ed., pp. 315-321, and Dicey's Conflict of Laws, pp. 648 *et seq.* This being clear the will was not revoked; and not revoked it was clearly valid as regards the wife's movable property. Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad (Deane's Wills Act, note to § 18, cites an authority for this), and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not, on principle, apply to French spouses married in England, but (according to English views) domiciled in France when they married.

In my opinion the will has been properly admitted to probate; but it will not apply to leasehold property, for that is not regarded as movable property, to which the *lex domicilii* is applicable. Dicey, p. 72. A great quantity of expert evidence was taken on the difficult question whether the French law of *communauté des biens* was to be applied to the property of these persons. As I understand the expert evidence, the question turns not only on the marriage, but on the effect of what the husband and wife did afterwards. This question may arise hereafter, but it does not arise now, and I purposely, therefore, say nothing more about it.

VAUGHAN WILLIAMS, L. J.¹ I agree in the conclusion of Sir F. JEUNE that the husband and wife intended to keep an establishment in England, and that they intended to marry under English law, and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Sir F. JEUNE does not accept, that at the date of the marriage the husband had an English domicile. . . . Then at that time his wife's movables became his property; and I think that, his wife's property in the movables having thereby ceased, it follows, quite independently of the 18th section of the Wills Act, that this loss of the power of disposition put an end to her will while it was still ambulatory, and rendered it of no effect, and that nothing but republication could revive it. . . .

*Appeal allowed.*²

¹ Part of this opinion, and the concurring opinion of RIGBY, L. J., are omitted. — ED.

² The question of revocation of a will of personalty is to be determined by the domicile of the decedent at the time of the alleged revocation. *Goods of Reid*, L. R. 1 P. & D. 74. Of a will of real estate, by the law of the situs. *Ware v. Waner*, 50 Fed. 310; *Evansville Ice & C. S. Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592 (*semble*). — ED.

QUARTIN v. QUARTIN.

COURT OF CASSATION, FRANCE. 1847.

[*Reported Sirey, Recueil*, 1847, I. 712.]

MR. QUARTIN, an English subject, died February 3, 1841, in Abyssinia, leaving a holograph will dated at Paris, January 31, 1839, and deposited with a notary of that city, by which he left half his property to his two sisters Marie and Charlotte, and the other half to his father and mother for life, with remainder to another sister and a brother. Soon after, Miss Marie Quartin, one of the legatees, also died in France, leaving a holograph will dated at Paris March 3, 1842, and deposited with a notary of that city, by which she named her sister Charlotte as universal legatee. Mr. Quartin senior petitioned for nullity of both instruments, on the ground that both testators, being English subjects, were incompetent to make a will, even in France, in the holographic form, which is not permitted by the English law.¹

On August 8, 1844, the Civil Tribunal of the Seine gave judgment.

THE TRIBUNAL. It is generally admitted as international law that the form of deeds is subject to the laws, usages, and customs of the country where they are executed; this principle, required by the nature of things, is of universal application, and governs all acts whatever, public and private alike, provided no doubt exists where they took place.

It is admitted that the wills in question, written by the testators themselves, are written, dated, and signed, and satisfy all the conditions necessary to their validity according to the Civil Code, under the jurisdiction of which they were made. Quartin claims that they are null for the single reason that the testators, being English subjects, were incapable in France of making holographic wills, since the law of their country recognizes only published wills. But suppose holographic wills are not good in England, the principle would be inapplicable in France. The argument of Quartin rests upon a confusion between the rules which concern the capacity of the person and those which concern the intrinsic form, the nature and the character of acts. If it is true that the statute personal follows the person wherever it finds him, it is also true that it is only for his status, his quality of major or minor, the extent and the limits of his rights and of his capacity; but the statute personal remains a stranger to the form and character of acts executed in a State whose laws and statutes determine the mode and manner of doing the acts. One easily comprehends that all that pertains to the solemnization of contracts, to their substantial elements, their nature, their form, belongs exclusively to the law of the country where they come into existence; a law to which a foreigner while within the

¹ Part of the case, involving another question, is omitted. — Ed.

country must conform, if he desires its protection for his right and the exercise he has made of his right. If this were not true a foreigner in France might be unable to accomplish a certain disposition which was permitted by the law and customs of his country only in a certain special form prohibited by our law.

It results from these principles that the two wills, being in conformity with the provisions of the Civil Code, which governs them according to the rule *locus regit actum*, are valid as to form; and their effects alone are to be examined.

The English statutes (differing from our own laws) make no reserve in favor of parents, and leave to children the entire power of disposition over their own property. Therefore as an English subject, the late Dillon Quartin might have disposed of all his property in favor of his brothers and sisters, or even of strangers. The property of the deceased in France is exclusively movable; and on principle movables follow the condition and capacity of the person. . . . It follows that Charlotte Quartin is entitled to half the succession of Dillon Quartin. . . .

Appeal by Mr. Quartin senior; but on July 7, 1845, the Royal Court of Paris gave judgment confirming the judgment of the lower judges and adopting their reasons. Appeal to the Court of Cassation.

THE COURT. The outward form and solemnization of acts are determined by the law of the country where they are executed. This principle is applicable to wills; and consequently the form of them is governed by the law of the country where the testator executes his will. Otherwise a foreigner might while outside his own country find himself unable to make a will, because of the impossibility of making use of the form required by the law of his domicile. Laws which determine the form in which a will ought to be executed do not touch the capacity of the testator, but only the outward solemnities which should accompany the expression of the testator's wishes. It follows that in deciding valid the will made at Paris by Quartin, an English subject, in the holographic form authorized by the French law, the judgment appealed from did not violate the law. *Appeal dismissed.*¹

¹ The form of a will is governed by the *lex loci actus*. 10 Clunet, 84 (Turin, 31 May, '81); 20 Clunet, 418 (Paris, 11 Aug. '92); see 20 Clunet, 955 (Genoa, 4 Aug. '91). A foreign testator may, however, legally adopt the forms used in his country. 22 Clunet, 847 (Seine, 28 June, '95).

The validity of a will is determined by the law of nationality or of domicile, at the death of the testator, whichever prevails in the country in question. By the law of domicile, 19 Clunet, 300 (Amsterdam, 31 Dec. '89); 19 Clunet, 1191 (Germany, 7 Jan. '90); 21 Clunet, 1077 (Austria, 13 June, '93.)

The right of the legatee to take depends on his law, 15 Clunet, 524 (Nancy, 14 Dec. '87). — ED.

SECTION III.

EXECUTION OF POWER.

IN RE PRICE.

CHANCERY DIVISION. 1900.

[*Reported* [1900] 1 *Chancery*, 442.]

STIRLING, J. Under the will of Lady Price the fund is to be paid and transferred in such manner as Madame Forfillier "shall by her last will appoint." The first question arises as to the word "will" which there occurs — whether it means any instrument recognized by the law of England as a will, or a will executed in accordance with the law of England. I shall first consider the three authorities which have been cited to me as bearing on this subject. The first is the case of *D'Huart v. Harkness*, 34 Beav. 324. There, under the will of an English lady, a sum of Consols was held upon trust for her daughter for her separate use for life, and after her decease upon trust for such persons as her said daughter "by her last will and testament in writing duly executed" should direct or appoint. The daughter was a Englishwoman by birth, but she married a domiciled Frenchman and resided in France till her death; she made a will, which was not attested, whereby she bequeathed the sum of Consols to her husband. This will was valid by the law of France, and had been admitted to probate in this country. It was held by Lord Romilly that the will was a valid execution of the power. It will be observed that, as regards the facts, that case is as near to the present case as one case can be to another. The material portion of the judgment is this, 34 Beav. 327: "A sum of money is given simply, to such person as the Baroness shall by her last will duly executed appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate; first, those which follow the forms required by 1 Vict. c. 26, § 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not

mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

The next case is that of *In re Kirwan's Trusts*, 25 Ch. D. 373, which came before Kay, L. J., when a judge of first instance. The facts of that case require some attention. The power there was by deed or will to be executed in the presence of two or more witnesses to appoint amongst children. The donee of the power was an English subject. His testamentary disposition consisted of two instruments; first, a will executed in accordance with English law, but invalid according to French law, and, secondly, a codicil not executed in accordance with English law, but valid according to the law of France. In order to have both will and codicil proved here, it was necessary to have recourse to Lord Kingsdown's Act, and the will and codicil, which together made the testamentary disposition, were admitted to probate by virtue of that statute. Now, the instrument which purported to execute the power was the codicil, which was unattested, and, consequently, was not an instrument falling within the terms of the power. Neither did it satisfy the requirements of the Wills Act. Upon that Kay, J. says (25 Ch. D. 379): "Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the Wills Act (1 Vict. c. 26), but it was a good testamentary document under 24 & 25 Vict. c. 114. . . . This being a good testamentary instrument by the law of the domicile of George Saint Lo Kirwan, which I understand was France at the time, although not executed as required by the Wills Act, has under the act which I have referred to been admitted to probate in England, and the documents admitted to probate are two, *i. e.*, the will of the 3d April, 1862, and the codicil of the 9th of May, 1871." Then, after considering the effect of that, he goes on to say (25 Ch. D. 381): "It is a good testamentary instrument, and its only defect is its want of attestation. But the Wills Act says that 'no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required,' that is to say, in the presence of and attested by two witnesses. The later act, 23 & 24 Vict. c. 114, does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this: It makes a will executed abroad by a British subject a good will if it be such a document as is recognized as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the Wills Act, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil as being a good and valid appointment either at law or in equity." Now, I pause there to remark that the facts of that case are different from those of the present case in two respects: first, the power was of a different kind, and, secondly, the testamentary disposition was

admitted to probate only by virtue of Lord Kingsdown's Act, whereas here Lord Kingsdown's Act does not come into operation. Unfortunately, *D'Huart v. Harkness* was not cited in *In re Kirwan's Trusts*, and I have not the benefit of any observations of Kay, J., upon it, but it has been considered by Kekewich, J., in the recent case of *Hummel v. Hummel*, [1898] 1 Ch. 642. The facts stated in the head-note are as follows: "A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law;" and it was held that the writing, even if admissible to probate under section 1 of Lord Kingsdown's Act, did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by sections 9 and 10 of the Wills Act. The question which I have to decide really did not arise there, because the document relied on as an execution of the power had not been admitted to probate; but Kekewich, J., does consider the question whether, supposing it could be proved, it would be a good execution of the power, and he proceeds on the footing that the will could only be proved under Lord Kingsdown's Act. He says this, [1898] 1 Ch. 645: "It is, I will assume, . . . a valid will according to the law of France; but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay, J., in *In re Kirwan's Trusts*, is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart v. Harkness*, where Sir J. Romilly, M. R., decided that a power to appoint 'by a will duly executed' is well exercised by a will good according to the law of the country of the testator's domicile, though ill executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts*; but the latter is cited in a note on page 308 of 1 Williams on Executors, 9th ed., as the authority for the proposition that in the case of a will which is only valid by reason of the Act 24 & 25 Vict. c. 114, sections 9 and 10 of the Wills Act must be complied with. That appears to me to form the distinction between the two cases." Then he refers to Lord Kingsdown's Act. The opinion there expressed by the learned judge appears to me to be that *D'Huart v. Harkness* was not inconsistent with *In re Kirwan's Trusts*, upon the ground that the latter decision only applied to a case in which the will was proved under the provisions of Lord Kingsdown's Act. That act only applies to the wills of British subjects. Madame Forfillier was not a British subject but a French subject, and as a matter of fact the grant of letters of administration with the will annexed was not under Lord Kingsdown's Act at all. Therefore, looking at the authorities and having regard to the views taken

by Kekewich, J., I am of opinion that I ought to follow *D'Huart v. Harkness* and not *In re Kirwan's Trusts*. But I go further. I think that on principle *D'Huart v. Harkness* was well decided. The general rule on the subject is, as stated by Mr. Dicey (*Conflict of Laws*, p. 684), that "Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid" in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England.

In *Bremer v. Freeman*, 10 Moo. P. C. 306, it appears to have been contended that the provisions of section 20 of the Wills Act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale, in delivering the judgment of the court, said, that for reasons referred to by him it was unnecessary to consider the point, but added (10 Moo. P. C. 359): "Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, *Conflict of Laws*, § 473), nor any that the statute 7 Will. IV. and 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law."

Section 9 of the Wills Act prescribes that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognize as valid the wills of persons domiciled abroad, although not executed as prescribed by the act. The present case affords an instance of this being done. I fail to see why the provisions of section 10 of the Wills Act should apply to the will of Madame Forfillier any more than those of section 9.

There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of the domicile of the testator at the time of his death: see *In the Goods of Alexander*, 29 L. J. (P. M. & A.) 93; *In the Goods of Hallyburton*, L. R. 1 P. & M. 90; *In the Goods of Huber*, [1896] P. 209. These cases, however, do not lay down that a power to appoint by will (without special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicile of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case.

In the view which I take I am not concerned to deal with *In re Kirwan's Trusts*, which is distinguishable in its facts from the present case; but I may say that the decision in that case may be rested on these grounds. First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had

no application, inasmuch as the testator was domiciled abroad; and although the instrument was not invalidated by the prohibitory portion of section 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the Wills Act. Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay, J., that statute does not contain any enactment dealing with wills made in exercise of powers. Although some of the language used by that learned judge may be susceptible of a different interpretation, I am not sure that he intended to decide anything inconsistent with the principle I have stated.

In my opinion, therefore, it was competent for Madame Forfillier to exercise the power conferred on her by Lady Price's will by such a will as has been recognized by the Probate Division. It remains to be considered whether she has done so. This question is one of construction.

In general a will is to be construed according to the law of the domicile of the testator: "but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country" (Dicey, *Conflict of Laws*, p. 695). Considering first the law of France, according to which *prima facie* the will is to be construed, the evidence shows that the will of Madame Forfillier is a complete disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a French court had to consider the effect of the will in this respect it would apply the English law. It is contended with regard to the law of England that the provisions of the Wills Act including section 27, are inapplicable, and that consequently the law of England applicable is the law as it existed before that act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the Wills Act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says, "I declare that this will annuls all the others . . . and that it shall thus be considered in England the same as in France." I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by section 27 of the Wills Act.

No question arises between Monsieur Forfillier and the daughter of his wife by her first marriage, who by the law of France might have a

claim if this fund had been part of Madame Forfillier's property ; for she appears and supports the claim of Monsieur Forfillier.

In my opinion, therefore, the husband, Monsieur Forfillier, is entitled to the fund.

SEWALL v. WILMER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[*Reported 132 Massachusetts, 181.*]

GRAY, C. J. Frederic Tudor of Boston, who died in 1864, by his will, which was duly admitted to probate in this Commonwealth, devised the residue of his estate, real and personal, in trust to the use of his children in equal shares till their arrival at the age of twenty-one years or marriage within that age ; and " as to, for, and concerning the share that shall hereunder be coming to " any daughter at her marriage or coming of age, " this to be held by said trustee in trust and to her use " till such marriage or coming of age, then in trust to convey " one half of her share," together with half of any accumulations of income, to her absolutely, discharged of all trusts ; and " as to and for the other half share of my said daughter, this to be held by said trustee to her sole and separate use, freed from the control or interference of her husband, during her natural life," yielding and paying the income to her quarterly on her sole and separate written order therefor, " and upon her death, then upon trust to convey, pay, and deliver, or hold the same, to the use of such persons, or for such uses, estates, and subject to such provisions, limitations, and agreements, as my said daughter shall, by any deed or writing to be by her signed, sealed, and delivered in presence of three or more credible witnesses, or by her last will and testament in writing, or by any writing purporting to be her last will and testament, to be by her duly executed in the presence of a like number of credible witnesses, give, direct, limit, and appoint, and, in default of such will or appointment, then upon trust to hold the same to the use of her children and their heirs respectively as tenants in common, and the legal representatives of any such child or children who may have deceased to be entitled to the same share as his or their parent would have been if then living ; and in case my said daughter shall die without issue, and without having made any testamentary disposition or appointment of the uses thereof," then to the testator's heirs at law.

His daughter Delia, in 1871, married Skipwith Wilmer of Baltimore, in the State of Maryland, and had four children by him, two of whom survived her, and she resided with her husband at Baltimore until her death in 1879. In 1872, a month before the birth of her oldest child, and having by the law of Maryland full testamentary capacity as if she

were unmarried, she signed and sealed in the presence of three witnesses a will, which was duly admitted to probate in Maryland, and also as a foreign will in this Commonwealth, the whole of which, except the formal parts and the appointment of her husband to be sole executor, was as follows: "I devise and bequeath all the real and personal estate to which I shall be entitled in law or equity at the time of my decease unto my husband Skipwith Wilmer aforesaid, his heirs and assigns, absolutely."

At the times of executing her will and of her death, the trustees, who had been appointed by decree of the Probate Court in this Commonwealth under the will of her father, and who resided here, held in trust for her property, real and personal, to the amount of \$80,000, all the real estate being situated in this Commonwealth; and she was the owner in her own right of personal property to the amount of \$20,000, and of real estate in this Commonwealth to the amount of \$40,000, and also of an equity, worth \$8,000, of redeeming other real estate in this Commonwealth from a mortgage made by her and her husband; parts of this equity of redemption and of her other real estate being subject to the dower of her father's widow.

The present suit is a bill by the trustees for the instructions of the court. Her husband and her two surviving children are made parties defendant, and have filed answers presenting the question whether the husband or the children are entitled to the property so held by the plaintiffs in trust for her.

It was suggested, though not strongly pressed, in behalf of the children, that, even if her will is expressed in apt terms to pass this property to her husband, yet the children are entitled to a share of it, under the Gen. Sts. c. 92, § 25, by which it is enacted that, "when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake." But it is a sufficient answer to this suggestion, that the statute is evidently limited to estate of a testator, to which his children would have derived title from him, under the statutes of descents and distributions, if he had made no will; and has no application to estate which was not vested in him, in which he had no inheritable title, but a power of appointment only, and which, in case of his failure to execute the power, his children could not have claimed under him as his heirs or next of kin, but only as devisees or legatees under the will of the person who created the power. *Blagge v. Miles*, 1 Story, 426, 442.

The principal point in controversy between the husband and the children of Mrs. Wilmer is whether her will is a good execution of the power conferred on her by the will of her father; and the arguments upon this point have presented three questions: 1st. Whether this is

a good execution under the law of Maryland? 2d. Whether it is a good execution by the law of Massachusetts? 3d. Which law must govern the case?

The decisions of the Court of Appeals of Maryland, which are made part of the report on which the case has been reserved for our determination, clearly show that the law is settled in that State, in accordance with English cases decided since the American Revolution, that "the intention to execute a power of appointment by will must appear by a reference in the will to the power or to the subject of it, or from the fact that the will would be inoperative without the aid of the power; *Mory v. Michael*, 18 Md. 227, 241; *Michael v. Morey*, 26 Md. 239, 259; *Maryland Society v. Clendinen*, 44 Md. 429, 435; and that it is also settled, upon principles everywhere recognized, that the admission of a will to probate establishes only its validity as a testamentary instrument, and does not determine the extent of its operation. *Michael v. Baker*, 12 Md. 158; *Schley v. McCeney*, 36 Md. 266, 275. As the will of Mrs. Wilmer does not mention the power, nor the subject of it, and as she had other property of her own upon which her will could operate, it is clearly not a sufficient execution of the power under the law of Maryland.

But in this Commonwealth the decisions in England since our Revolution and before the St. of 7 Will. IV. & 1 Vict. c. 26, § 27, have not been followed; the court has leaned toward the adoption of the rule, enacted by that statute as to wills thereafter made in England, namely, that a general devise or bequest should be construed to include any real or personal estate of which the testator has a general power of appointment, unless a contrary intention should appear by his will; and it has been adjudged that the mere facts that the will relied on as an execution of the power does not refer to the power, nor designate the property subject to it, and that the donee of the power has other property of his own upon which his will may operate, are not conclusive against the validity of the execution of the power; but that the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it; and a general devise of all the estate, real and personal, of which the testator should die seised or possessed, has accordingly been held to be a good execution of a power reserved to him in a trust settlement, made by him or by his direction, of property either his own or for which he had paid the consideration, and of which by the terms of the settlement he had the beneficial use during his life, as well as an absolute power of appointment after his death. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270. See also the very able opinions of Chief Justice Denio in *White v. Hicks*, 33 N. Y. 383, and of Mr. Justice Baker in *Frank v. Eggleston*, 92 Ill. 515.

In the present case, Mrs. Wilmer indeed had never owned the property in question, nor paid any consideration for it, nor had the power been created by herself. But the power was created by the will of her father, in which he speaks of the property to be conveyed to her on her coming of age or marriage, and of the property to be thereafter held in trust for her sole and separate use during her life, and conveyed to her appointees, or, failing any appointment, to her children, after her death, as together constituting "her share" of his estate. If she had been domiciled in this Commonwealth, and had here executed the will devising and bequeathing to her husband all the real and personal estate to which she should be entitled in law or equity at the time of her decease, it must, under the law of Massachusetts, as declared by the judgments of this court, have been held that she intended to make no distinction between the two halves of her share of her father's estate, of which the one had vested in her absolutely, and the other she had the exclusive beneficial use of for life and the general power to appoint after her death, and that the power was well executed.

We are then brought to the more interesting question, whether the construction and effect of the instrument, relied on as an execution of the power conferred on Mrs. Wilmer by her father's will, are to be governed by the law of Massachusetts or by the law of Maryland. This question is singularly free of direct authority.

As to the form of executing the power, it would seem that a will executed in the form authorized by the law of either State would be sufficient. On the one hand, it has been decided by the House of Lords, on appeal from Scotland, that a power of appointment reserved by a man residing out of Scotland, in a settlement by him of real estate in Scotland, was well executed by a will in the form required by the law of his domicile. *Willock v. Ouchterlony*, 3 Paton, 659; *Brack v. Johnston*, 5 Wils. & Sh. 61. And a like decision has been made by Lord Romilly, M. R., in a case of the execution in France of a power created by an English will. *D'Huart v. Harkness*, 34 Beav. 324. On the other hand, it is held in England that where a power of appointment by will is given by the will of a person domiciled in England, and is executed abroad by a will in a form required or permitted by the law of England, the will of the donee should be admitted to probate in England, although not executed with the forms required by the law of the donee's domicile. But it does not distinctly appear whether this is upon the broad ground that the power is well executed, or upon the narrower ground that the will should be formally established as a testamentary instrument in a court of probate, leaving it to a court of construction to determine whether it can have any effect. *Tatnall v. Hankey*, 2 Moore, P. C. 342; *Goods of Alexander*, 29 L. J. (N. S.) Prob. 93, 94; s. c. 1 Sw. & Tr. 454, note; *Barnes v. Vincent*, 5 Moore, P. C. 201, 217; *D'Huart v. Harkness*, 34 Beav. 328; *Goods of Hallyburton*, L. R. 1 P. & D. 90.

The case at bar does not present a question of form, but of construc-

tion; and upon principle the instrument executed by Mrs. Wilmer, being expressed in terms sufficient to constitute an effectual appointment by the law of Massachusetts, must be held a good execution of the power.

It is true that, as to personal property at least, the construction and effect of a will, and the distribution thereby made of the testator's estate, are to be governed by the law of his domicile. *Yates v. Thomson*, 3 Cl. & Fin. 544, 570, 585; s. c. 1 Sh. & McL. 795, 835; *Enohin v. Wylie*, 10 H. L. Cas. 1; *Harrison v. Nixon*, 9 Pet. 483; *Fellows v. Miner*, 119 Mass. 541, 544. But the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will. The domicile of the testator whose property is in question is therefore the domicile of the father. The property is held by trustees residing and appointed in Massachusetts, and must be distributed here, and the trustees cannot be compelled to account for it in Maryland or in any other State, even if they should be personally found there. *Campbell v. Wallace*, 10 Gray, 162; *Jenkins v. Lester*, 131 Mass. 355; *Leland v. Smith*, 131 Mass. 358, note. As the father did not require the power to be executed by will, but allowed it to be executed by any instrument purporting to be a will, or by any deed or writing signed and sealed in the presence of three witnesses, it is clear that he did not intend that it should be executed only by will effectual according to the law of his daughter's domicile; and she cannot be presumed to have intended that the instrument executed by her in the form of a will should have less effect than if it had no testamentary character.

As the property which Mrs. Wilmer has the power to dispose of is the property of a person domiciled here, is here held by trustees who can only be compelled to account for and distribute it here, and is part of her share of her father's estate, the other part of which, clearly included in her will, she has derived from the same source, and as no testamentary form is requisite to her execution of the power, she must be presumed to have intended that her will should have the effect, by way of appointment, attributed to it by the law of the only place in which it could be made operative as such, and by the court upon which the duty of expounding it devolves.

The decision in *Bingham's Appeal*, 64 Penn. St. 345, goes farther than is necessary for the decision of this case. William Bingham died in 1856, having his domicile in Pennsylvania, and by his will bequeathed personal property in trust to pay the income to his son for life, and upon his death to pay the principal to such persons as he should by will bequeath it to, or, in case of his dying intestate, to his issue, or, failing such issue, to other children of the testator. The son afterwards died domiciled in England, leaving a large estate of his own, and a will devising and bequeathing "all the rest and residue of my prop-

erty," in terms sufficient under the St. of 7 Will. IV. & 1 Vict. to execute the power, but insufficient for that purpose by the law of Pennsylvania. The Supreme Court of Pennsylvania held that the power was not well executed, because the property in question was William Bingham's, and not his son's, and therefore, applying the rule that the same interpretation of a will should be given in a foreign country which the will has in the place of domicile, "the will, the property, and the domicile of William Bingham being within Pennsylvania, the law of this State must govern the interpretation both of the power and the execution of it."

In the case at bar, the instrument executed by Mrs. Wilmer being sufficient under the law of Massachusetts, and therefore a good execution of the power, it is unnecessary to consider whether, if it had been sufficient by the law of Maryland and insufficient by the law of Massachusetts, it would have been an equally good execution. And all the real estate concerning which the plaintiffs ask for the instructions of the court being in Massachusetts, it becomes also unnecessary to consider how far, had it been situated elsewhere, the *lex domicilii* should yield to the *lex rei sitæ*. See *Bovey v. Smith*, 1 Vern. 60, 84, 144; *Trotter v. Trotter*, 4 Bligh N. R. 502; s. c. 3 Wils. & Sh. 407; 1 Jarman on Wills, 1; Story Conf., §§ 479 *a*, 479 *h*; Whart. Conf., § 597; Dicey on Domicil, 307; Westlake's Private International Law (ed. 1880), 181.

The result is, that in the opinion of a majority of the court the power of appointment has been well executed, and there must be a

*Decree for the husband.*¹

¹ Conversely, if a will would be regarded at the domicile of the testator as an execution of the power, but would not be so regarded at the domicile of the donor of the power, it is not a good exercise of the power. *Bingham's Appeal*, 64 Pa. 345; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530. — Ed.

CHAPTER IX.

OBLIGATIONS EX DELICTO.

PHILLIPS v. EYRE.

EXCHEQUER CHAMBER. 1870.

[*Reported Law Reports, 6 Queen's Bench, 1.*]

WILLES, J.¹ This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested by force of arms; that an act was afterwards duly passed by the legislature of the island, and received the royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the governor with the advice of a council of war; that the rebellion had been suppressed and imminent general sacrifice of life thereby averted; that the military, naval, or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion; and that all persons who in good faith and royal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such their acts of loyalty, — it was enacted by the governor, legislative council, and assembly of the island, amongst other things, that the defendant and all officers and other persons who had acted under his authority, or had acted *bona fide* for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were “thereby made and declared lawful, and were confirmed.” The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and *bona fide* done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the

¹ Part of the opinion is omitted. — ED.

law of Jamaica, a necessary party to the making of the act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error. . . .

The last objection to the plea of the colonial act was of a more technical character; that assuming the colonial act to be valid in Jamaica and a defence there, it could not have the extraterritorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. "*Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt.*" A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but, *prima facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: *Doulson v. Matthews*, 4 T. R. 503; and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character, that it would have been actionable if committed in England; therefore, in *The Halley*, Law Rep. 2 P. C. 193, the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore,

in *Blad's Case*, 3 Swan. 603, and *Blad v. Bamfield*, 3 Swan. 604, Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree v. Napier*, 2 Bing. N. C. 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified, by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *Reg. v. Lesley*, Bell C. C. 220; 29 L. J. (M. C.) 97, an imprisonment in Chili on board a British ship lawful there, was held by Erle, C. J., and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber v. Steiner*, 2 Bing. N. C. 202, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (*tempus et modum actionis instituendæ*), and did not affect to destroy the obligation of the contract (*valorem contractus*); and on the other hand by *Potter v. Brown*, 5 East, 124, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Balantine v. Golding*, Cooke's Bankrupt Law, 487, and ever since recognized that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere." So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, *ex delicto*, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but

there is no such law (unless it be the Governors Act already discussed and disposed of) applicable to the present case.

It may be proper to remark, before quitting this part of the subject, that the colonial act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad; so that, for instance, if a foreign country after a rebellion or civil war were to pass a general act of oblivion and indemnity, burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure results of anarchy and violence, it would, if the argument for the plaintiff prevailed, be competent for a municipal court of any other country to condemn and disregard, as naturally unjust or technically ineffectual, the law of a sovereign State, disposing, upon the same constitutional principles as have actuated our own legislature, of matters arising within its territory — a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as showing that the acts complained of were incident to the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

MACHADO v. FONTES.

COURT OF APPEAL. 1897.

[Reported [1897] 2 *Queen's Bench*, 231.]

APPEAL from KENNEDY, J., at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the defendant in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil

cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before KENNEDY, J., in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.¹

LOPES, L. J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea; that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful — I use the word "wrongful" deliberately — both by the law of this country and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips v. Eyre*, L. R. 6 Q. B. 1, Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this (at p. 28): "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham*, 1 P. D. 107, James, L. J., in the course of his judgment, uses these words (at p. 111): "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration that state of the law, — that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in re-

¹ Arguments of counsel are omitted. — Ed.

spect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes, J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY, L. J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes, J., in *Phillips v. Eyre*, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shown by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocence of the act in the foreign country is an answer to the action. That is what

is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes, J., in *Phillips v. Eyre*; and in the case of *The M. Moxham*, all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner: and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes, J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published. James, L. J., states, in *The M. Moxham*, what the settled law is. Mellish, L. J., is quite as clear upon that point as James, L. J., in laying down the general rule; and Baggallay, L. J., also takes the same view. We start, then, from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

*Appeal allowed.*¹

¹ In *Scott v. Seymour*, 1 H. & C. 219, 234, in the Exchequer Chamber, WIGHTMAN, J., said *obiter*: "I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespasses were recoverable by the law of the foreign country, and without any allegation that such trespasses were lawful or justifiable in that country. By the law of England, an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject." BLACKBURN, J., said: "If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners." WILLIAMS, J., said, as to the dictum of WIGHTMAN, "as at present advised, I am not prepared to assent to it." The other judges declined to express an opinion on the point. — ED.

LE FOREST v. TOLMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875.

[Reported, 117 *Massachusetts*, 109.]

GRAY, C. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28; s. c. 17 Pet. 20; *The China*, 7 Wall. 53, 64; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, 3 Swanst. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Richardson v. New York Central Railroad*, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509; *Pressed v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this Commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. Sts. c. 88, § 59. This statute is not a penal, but a remedial statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.

*Exceptions sustained.*¹

¹ Acc. *The Lamington*, 87 Fed. 752; *Carter v. Goode*, 50 Ark. 155, 6 S. W. 719; *Whitford v. Panama R. R.*, 23 N. Y. 465; *Holland v. Pack, Peck*, 151; *McLeod v. R. R.*, 58 Vt. 727; 16 *Clunet*, 664 (French Cass. 16 May, '88). — Ed.

DAVIS *v.* NEW YORK AND NEW ENGLAND RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887.

[Reported 143 *Massachusetts*, 301.]

DEVENS, J. The defendant is a railroad corporation, operating a railroad through Massachusetts and Connecticut, as a continuous line, by virtue of the St. of 1873, c. 289, and exists as a corporation by the laws of each of these States. This action is brought by the plaintiff, as administrator of the estate of Mrs. Ruth L. Brown, for alleged injury to her, which finally resulted in her death, by reason of the carelessness of the defendant and that of its servants, while she was being conveyed as a passenger over its railroad in Connecticut, the intestate being herself at the time in the exercise of due care.

The law of the State of Connecticut has been properly determined as a fact by the judge presiding at the trial, and his finding in regard to it is conclusive. *Ames v. McCamber*, 124 Mass. 85, 91. From this it appears "that, by the common law in Connecticut, an action for personal injuries does not survive to the administrator of the person injured; that there is no statute or law in Connecticut by virtue of which a common-law action for personal injuries is revived, or made to survive to an administrator of the person injured." The facts, as they are alleged, "do not constitute a cause of action under the laws of the State of Connecticut by the administrator in behalf of the intestate's estate, and this action could not be maintained in that State, if duly brought by an administrator there." The administrator may there maintain, upon these facts, a special action, penal in its nature, created by the statutes of Connecticut, by which the damages recoverable are limited to not more than \$5,000, and under which the damages recovered do not become assets of the estate, but are recovered in behalf of certain persons not thus entitled to the same according to the laws of distribution, and are to be paid over in specified proportions to them.

The plaintiff does not contend that he may maintain this action as the special one provided by the statute of Connecticut, nor under the laws of that State. *Richardson v. New York Central Railroad*, 98 Mass. 85. We are aware that the correctness of this decision has been called in question by the Supreme Court of the United States in *Dennick v. Railroad*, 103 U. S. 11; but it is unnecessary to reconsider our own decision, as the plaintiff seeks only to maintain his action under our statute, which provides that, in case of damage to the person, the action shall survive, and may thus be prosecuted by an administrator. Pub. Sts. c. 165, § 1; *Hollenbeck v. Berkshire Railroad*, 9 Cush. 478. The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the State where it accrued, not having been made there to survive by any statute, will survive under and by

virtue of the statutes of survivorship of another State, so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property. That our statute would furnish a remedy, where the cause of action was one recognized by the law of this State as the foundation of an action at common law, although it accrued without the State, it being there recognized as existing, and not discharged or extinguished, will be conceded.

It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the State, or who resorts to another State for his remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and, as by the law of Massachusetts it is required that a person injured while travelling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care, and as jurisdiction may be obtained by an attachment of property of the defendant in another State, the plaintiff might relieve himself of the necessity of proving his own due care, if, by the law of the State to which he may resort, such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the State in which it was performing its business. In a similar way, if a traveller upon a steam or horse railroad could not recover in this State for an injury done by carelessness in transporting him, because he was travelling upon Sunday, in violation of the laws of the State, he might, unless the law prescribed in this State is to govern, recover in any State where laws forbidding travelling on Sunday did not exist, if jurisdiction could there be obtained over the defendant or its property. Where an injury occurs in another State, which would be the foundation of an action at common law, and it is known that the general law of that State is the common law, it may be inferred that the transaction is governed by its rules as here applied, in the absence of evidence to the contrary; but, when it is shown to be otherwise, the law of the State where the injury occurs is to be regarded. It is a general principle, that, in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought. *Le Forest v. Tolman*, 117 Mass. 109, and cases cited. It must be for the State of Connecticut to prescribe when, and under what circumstances, a cause of action shall arise against a corporation which operates a railway within its limits, by reason of an act done by it. It may provide that, for an injury done by its carelessness, there shall be no cause of action on behalf of the injured party, but punishment by indictment only, or it may give to such injured person a cause of action, and for the same injury make the corporation

responsible, by indictment or other proceeding, for a fine or damages which shall go to the State, to relatives of the injured party, or to any other persons named. *Commonwealth v. Metropolitan Railroad*, 107 Mass. 236.

The intestate did, by the common law of Connecticut, have a right of action during her lifetime, but for this has been substituted in that State, she having deceased, the penal action created by the statute.

It is the contention of the plaintiff, that the cause of action may be held to survive by virtue of our statute, notwithstanding no cause of action now exists in Connecticut. Pub. Sts. c. 165, § 1. That the special action in Connecticut can now be maintained is not controverted. If, therefore, this contention of the plaintiff is correct, the defendant continues liable for its act or neglect in Connecticut by the law of Massachusetts, while it is also liable by reason of the penalty imposed upon it by the law of Connecticut as a substitute for its original liability, such penalty being still capable of enforcement. The design of our statutes of survivorship is primarily to provide for survival of those actions of tort the causes of which occur in this State. If similar statutes existed in another State, where the original cause of action accrued, it would not be difficult to hold that our own applied to such causes, upon the same principle by which we hold that the intestate herself might originally have brought her action here. When no such cause of action now exists in the State where the injury occurred, it is not easy to see how it can exist here, especially when, in such State, another cause of action, growing out of the same facts, has been substituted for it. This would be to subject the defendant to two liabilities, one existing by the law of the State in which jurisdiction over person or property was obtained, but in which the accident did not occur; and the other imposed by the law of the State where it did occur, and where the defendant had its residence; while in either State the liability there imposed would be the only one to which the defendant could by its law be subjected.

It may be suggested, that the law of Connecticut, in failing to provide that an action for a personal injury shall survive to the administrator, has, negatively, only the same effect as a statute of limitations, which operates merely to take away the remedy of a plaintiff, while his cause of action still exists.

By the ancient common law, as it existed before the St. of 4 Edw. III. c. 7, which was adopted and practised on in this State before the Constitution, 6 Dane Abr. 607, no action *ex delicto* survived to the personal representative, the maxim *Actio personalis moritur cum persona* being of universal application. *Wilbur v. Gilmore*, 21 Pick. 250. Subsequently to that statute, which was liberally construed, an action for a tort, by which the personal property of one was injured or destroyed, survived to his administrator, such tort being an injury to the property which otherwise would have descended to him. But the theory that a personal injury to an individual was limited to him only,

that no one else suffered thereby, and that therefore by his decease the cause of action itself ceased to exist, continued.

While the action for personal injury is spoken of as surviving, as there previously was no responsibility to the estate, the statute creates a new cause of action. It imposes a new liability, and does not merely remove a bar to a remedy such as is interposed by the statute of limitations, which, if withdrawn by the repeal of the statute, would allow an action to be maintained for the original cause. What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the State where the injury occurs, unless the legislation of other States is to have extraterritorial force, and govern transactions beyond their limits. We perceive no intention to invest it with such force, even if it were possible so to do.

By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that State to determine what provision, by action or indictment, if any, shall be made in order to indemnify the estate of the intestate, or her relatives, or to punish the party causing the injury to her. Our statute, permitting the survival of similar actions in this State, does not therefore apply.

The question considered in the case at bar was fully and ably discussed in *Needham v. Grand Trunk Railway*, 38 Vt. 294, and the same result reached as that at which we have arrived. To the same effect also is *State v. Pittsburgh & Connellsville Railroad*, 45 Md. 41.

The plaintiff, in his argument, attaches importance to the St. of 1873, c. 289, by virtue of which the defendant's railroad is operated in the several States through which it runs as a continuous line; but the fact that it is a corporation by the law of Massachusetts as well as by that of Connecticut cannot make its liabilities different or greater in this State on account of transactions occurring entirely in Connecticut; nor are the rights of the plaintiff greater because his intestate, who was injured in this transaction, was a citizen of this Commonwealth. *Whitford v. Panama Railroad*, 23 N. Y. 465, 472; *Richardson v. New York Central Railroad*, *ubi supra*.

The ruling that the action could be maintained was therefore erroneous.

*Exceptions sustained.*¹

¹ *Acc. Davidow v. Pennsylvania R. R.*, 85 Fed. 943; *De Ham v. Mex. Nat. Ry.*, 86 Tex. 68, 23 S. W. 381; *Needham v. R. R.*, 38 Vt. 294. — Ed.

HIGGINS v. CENTRAL NEW ENGLAND AND WESTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892.

[Reported 155 *Massachusetts*, 176.]

BARKER, J. The plaintiff's intestate was domiciled in Massachusetts, where the plaintiff was appointed administrator. This being the principal administration, the plaintiff succeeded as well to every right of action of the deceased which survived as to his other personal property. Upon the question whether such an administrator takes a right of action by succession from his intestate, it is immaterial that the right arose under the statute of a foreign State, rather than under the common law or the statutes of this State; just as the fact that the intestate's chattels or merchandise had been acquired or were held under the statutes of a foreign State, rather than under the law of his domicile, is immaterial upon the question whether such merchandise or chattels pass to the administrator.

Such an administrator is entitled to the aid of our courts, if they have jurisdiction of the necessary parties, in collecting and reducing into money the property which he takes by succession, whether goods, chattels, or choses in action.

Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Richardson v. New York Central Railroad*, 98 Mass. 85, and in *Davis v. New York & New England Railroad*, 143 Mass. 301. In *Richardson's* case an administrator appointed here sought to enforce in our courts a cause of action which his intestate never had, which had not passed to the administrator by succession, and which the statutes of another State had caused to spring up at the death of the intestate, and had provided might be brought by and in the names of his personal representatives, for the exclusive benefit of his widow and next of kin. In *Davis's* case the intestate had a right of action in his lifetime by the common law of the State of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that State.

In the present case the plaintiff's intestate is alleged to have been instantly killed in Connecticut, by the defendant's negligence. It is conceded that the statute of that State makes the defendant liable to pay damages for the injury which caused his death. Can his administrator sue here to recover such damages? The Connecticut statute places in one category "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death," and all actions "to the reputation, or to the property, and actions to

recover damages for injury to the person of the wife, child, or servant of any person," and provides that all shall survive to the executor or administrator. Gen. Sta. of Conn. of 1888, § 1008. One evident purpose of this statute was to give to actions for injuries resulting in instantaneous death the same incidents as actions which survive have. It is grouped with actions which survive for other injuries to the person, and for injuries to reputation and to property, and all are said to survive. The putting in operation of the negligent or unlawful forces which cause an instantaneous death is a wrong to the person killed, which, by more or less of appreciable time, precedes his death. If the law of the country where such a wrong is committed gives to the person killed a right of action, and provides that it shall survive to his administrator, there is no difficulty in considering that the deceased had that right of action at the instant when he was *vivus et mortuus*, and that by express provisions of law it is made to survive and to pass to his administrator. This the statute referred to has plainly attempted to do. As was held in *Davis v. New York & New England Railroad*, *ubi supra*, it is the right of each State "to determine by its laws under what circumstances an injury to the person will afford a cause of action." Viewing this statute of Connecticut as a whole, it plainly puts such causes of action as the present upon the footing of personal actions which survive, and which are everywhere considered transitory; that is, they go with the person who has the right of action where he goes, and are enforceable in any forum according to its rules of procedure. If they survive, such actions, like other personal estate, are considered to have situs in the place of domicil, and to pass to the administrator there appointed. Viewing the causes of action with which the Connecticut statute deals in connection with the one now sued on, our own statutes of survivorship are similar. There is, therefore, nothing in the nature of the cause of action as so far developed to prevent our courts from entertaining it upon principles generally recognized.

Assuming that the cause of action is one not existing at the common law, but created by the statute of another State, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State

or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. *Blanchard v. Russell*, 13 Mass. 1, 6; *Prentiss v. Savage*, 13 Mass. 20, 24; *Ingraham v. Geyer*, 13 Mass. 146; *Tappan v. Poor*, 15 Mass. 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221, and 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 438, 443; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353; *Bank of North America v. Rindge*, 154 Mass. 203.

Applying these rules, we find no sufficient reason for declining to entertain the present action. Our own statutes have, in several instances, changed the policy of the common law, so as to allow damages for death occasioned by negligence. Pub. Sts. c. 52, § 17; c. 73, § 6; c. 112, § 212; St. 1883, c. 243; St. 1887, c. 270, § 2. The right created by the Connecticut statute is in terms a right to recover "just damages." Gen. Sts. of Conn. of 1888, § 1009. Neither the fact that the statute creating it limits the amount of the recovery to a sum not exceeding five thousand dollars, nor that the damages are to be distributed to the husband, widow, heirs, or next of kin, makes it a penal action. The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured. Such a right is not unjust, nor contrary to good morals, nor calculated to injure the State or its citizens. Our courts have jurisdiction of the necessary parties. Looking at the statute creating the right of action as a part of the system of law in force in Connecticut, and considering that, if the action is to be prosecuted here, our rules of law regulating procedure, and fixing the elements which are to enter into the assessment of the damages, must govern the trial, it is probable that the result will not be exactly the same as if the remedy had been pursued in Connecticut. But we see no such difficulty as to lead us to suppose that injustice may be done to the defendant, and none which ought to make us decline jurisdiction, if the plaintiff elects to sue here.

The statutes which create and limit the right of action are found in the provisions regulating civil actions in the courts of Connecticut, and are part of its general system of law. By "the costs and expenses of suit," which, under § 1009, are to be deducted from the damages before they are distributed, were intended costs of suit allowed under Connecticut laws, and the expenses of the suit exclusive of such costs, these expenses, including those of trials not resulting in a verdict, are a constituent element of the "just damages" under the Connecticut system. The same system allows exemplary and vindictive damages. *Noyes v. Ward*, 19 Conn. 250; *Beecher v. Derby Bridge & Ferry Co.* 24 Conn. 491, 497; *Murphy v. New York & New Haven Railroad*, 29

Conn. 496, 499. If, in the action prosecuted here, neither the expenses of the suit nor exemplary nor vindictive damages can be recovered, that fact is no hardship upon the defendant. There is no reason why the plaintiff may not be allowed to waive those elements of damage, by bringing his action in a forum where they cannot be allowed. It is also a part of the Connecticut system, that, upon the default of a defendant in such actions, the plaintiff has no right to have his damages assessed by a jury, and in practice the assessment is uniformly made by the court alone. Gen. Sts. of Conn. of 1888, § 1106; *Raymond v. Danbury & Norwalk Railroad*, 43 Conn. 596, 598. Upon such assessment in Connecticut, the defendant, to reduce the damages to a nominal sum, may show contributory negligence, or any matter which, if pleaded and proved in bar, would have defeated the action. *Daily v. New York & New Haven Railroad*, 32 Conn. 356; *Carey v. Day*, 36 Conn. 152. But even if it appeared that the motive for bringing an action here was to insure an assessment of the damages by a jury, we cannot perceive in that a valid reason for declining to take jurisdiction.

It is to be noticed that, while the statute upon which the plaintiff founds his claim makes the cause of action one which accrued to the plaintiff's intestate in his lifetime, and provides that it shall survive and pass to his administrator, it does not say in terms that the damages shall or shall not be assets of the intestate estate, but provides that they shall be distributed in a way which may or may not be different from the disposition to be made under our law of the assets of the deceased to be administered. As this intestate was domiciled in Massachusetts, we are not to be taken as now deciding how any damages which the plaintiff may recover are to be here administered.

*Demurrer overruled.*¹

WHITTEN v. BENNETT.

CIRCUIT COURT OF THE UNITED STATES, DIST. CONNECTICUT. 1898.

[Reported 77 *Federal Reporter*, 271.]

TOWNSEND, District Judge. This is an action by George E. Whitten, of Newton, Mass., against William L. Bennett, of New Haven, Conn., executor of the will of Tilton F. Doolittle, deceased, late of said New Haven, and John R. Leete, of said New Haven. The complaint alleges that said Doolittle, while State's attorney for New Haven County, Conn., drew an indictment charging plaintiff, together with J. Edward Lee, with murder in the second degree, and, knowing that he had no evidence to support said indictment, handed it to the grand jury, and told them that, if they found probable cause against Lee, they should mark

¹ *Contra*, *Texas & P. Ry. v. Richards*, 68 Tex. 375, 4 S. W. 627.—ED.

the indictment, "A true bill," and that, as plaintiff was not in the State, they were to pay no attention to it as connected with him; that the grand jury were satisfied that there was no case against the plaintiff, but, by mistake and clerical error, indorsed said indictment, "A true bill"; that although Doolittle knew that the grand jury did not indict the plaintiff, and that the indorsement was caused by said Doolittle's statements to them, he obtained a requisition, and sent the other defendant, Leete, to bring the plaintiff from Massachusetts; that Leete was instructed by Doolittle to bring the plaintiff with all speed and haste from Massachusetts, so that the plaintiff could not have the benefit of the writ of habeas corpus; that plaintiff was arrested by a warrant from the governor of Massachusetts, and taken to the police station at Newton; that the defendant Leete falsely and fraudulently represented to the marshal and keeper of the Newton police station that the plaintiff was charged with murder in the first degree, — an offence not bailable, — and that thereby the plaintiff was not admitted to bail in Massachusetts, as otherwise would have been the case, and was prevented from suing out a writ of habeas corpus; that plaintiff was a surgeon in good practice and of good reputation; that, he was subject to imprisonment and great indignity; suffered great pain of mind; lost a large part of his income; expended enormous sums of money in obtaining his release; and has been injured in his good name and practice. The damages claimed are \$100,000.

To this complaint, the defendant Bennett demurs, upon the following grounds: (1) The cause of action does not survive against the executor. (2) The decedent, Doolittle, was not responsible, in a private action, for acts done by him as State's attorney within the line of his powers and duties. (3) It is not alleged that the prosecution was instituted without probable cause. (4) It is not alleged that the prosecution has been terminated by the acquittal or discharge of the plaintiff. (5) The complaint does not state a cause of action. Defendant Leete demurs, on the ground that the process was valid on its face, and that he was protected thereby, and that the complaint does not allege that the prosecution is terminated.

Plaintiff claims, as to the defendant Bennett, that the process was founded upon an indictment not actually made by the grand jury, and was therefore wholly void, and in no way protected any one acting under it. The statutes of Massachusetts provide that certain injuries, which do not survive by the common law or by the statutes of the State of Connecticut, shall survive against the executor. Thus, an action for false imprisonment survives against the executor in Massachusetts. Plaintiff claims that, by means of said acts of the deceased, he was actually imprisoned in Massachusetts; that he has a good cause of action for injuries done in Massachusetts; and that as these would, by the laws of Massachusetts, survive against the executor, they must be held to so survive here. I do not understand that the Massachusetts statute limits the survival of such actions to those in

which the causes of action arose in the State of Massachusetts. If, therefore, one should falsely imprison another in an adjoining State, and then remove to Massachusetts, and die, it would seem that the cause of action would survive against the executor there; or if the deceased had been domiciled in Massachusetts when he died, and his estate was in process of settlement there, I think an action of false imprisonment would lie against the executor, even though the imprisonment was done in Connecticut. But this is a common-law action for a personal wrong, alleged to have been committed by defendant's testator, who was domiciled in Connecticut at the time of his decease. The law of the jurisdiction within which the decedent was thus domiciled determines the nature and extent of the remedy for such wrongs. At the time of the alleged commission of said wrongs, there was no statute in Connecticut providing for the survival of actions therefor. "All private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to them, or as to any acts of malfeasance or misfeasance to the person or property of another, unless some valuable fruits of such acts have been carried into the estate." *Mitchell v. Hotchkiss*, 48 Conn. 9, 16; *Payne's Appeal*, 65 Conn. 297, 408, 32 Atl. 948, 952; *Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787.

This conclusion renders it unnecessary to consider the other questions involved, so far as they affect the executor.

The defendant John R. Leete served the process. I cannot assent to plaintiff's claim that it was so far void as not to protect the person serving it. It is not disputed that the record in the Connecticut superior court shows a proper indictment, and that the papers are regular. The officer serving the process ought not to be obliged to inquire whether the grand jury made a mistake in doing what they did. The process was valid on its face, and protected him.

Both demurrers are sustained.

ALEXANDER v. PENNSYLVANIA COMPANY.

SUPREME COURT OF OHIO. 1891.

[Reported 48 Ohio State, 623.]

BRADBURY, J.¹ The record discloses that the plaintiff in error, a boy of about sixteen years of age, was in the service of the defendant as one of a gang of employees engaged in relaying the track of a branch of defendant's railroad; that his work, mainly, consisted in carrying water for the other members of the gang; occasionally, however, he

¹ Part of the opinion only is given. — Ed.

assisted in the work they were doing; that on the day he was injured a train of cars loaded with cinders, for ballasting the track, was waiting to be unloaded, and that as he was climbing on one of the cars, or perhaps had gotten on it, to help unload the cinders, the train was started forward, by reason of which he was thrown from the car, under its wheels, receiving, besides other lesser injuries, one necessitating the amputation of a leg between the ankle and knee. The foreman of the gang discharged and employed men, had immediate control of them while at work, and of the work being done. Undoubtedly, according to the law of this State, he was such a representative of the company as would render it liable to one of the gang of men under his control, who should be injured by his negligence. At this point there is a conflict in the testimony respecting the conduct of the plaintiff in error and the foreman, and the immediate circumstances under which the plaintiff went upon the car and the train put in motion; but there is evidence from which the jury could find that the foreman ordered the plaintiff to assist in unloading the cinders; that in obedience to this order he attempted to climb upon a car; that he did so in a reasonably careful manner, and that the foreman carelessly, even recklessly, ordered the train to be moved forward before the plaintiff had secured himself a safe footing upon the car he was attempting to board, thereby throwing him from it and under its wheels, causing the injury of which he complains; thus giving to the plaintiff, according to the law of Ohio, a right of action against the railroad company.

The real questions in contention between the parties in this court arise out of the fact that the accident occurred in the State of Pennsylvania. . . .

The record discloses that the contract by which the plaintiff in error was employed, was made in the State of Pennsylvania; that his services were to be rendered wholly within that State, and that he was injured therein.

If the right of a servant to recover damages from his master on account of an injury received through the negligence of a superior servant of the same master arises out of contract, then the case of *Knowlton v. Erie Railway Co.*, 19 Ohio St. 260, is decisive of the case at bar. The syllabus of that case reads: "The defendant is a common carrier of passengers, incorporated by the laws of New York, and was sued as such common carrier on account of injuries received by the plaintiff whilst being carried as a passenger from one point to another on defendant's road, and wholly within said State. The injury was charged to have been occasioned by defendant's negligence. The pleadings show that the plaintiff was being carried gratuitously at the time of the accident, under a contract by which the plaintiff assumed all risks of accident and injury arising from negligence, etc., and that such contract is valid by the laws of New York. *Held*: That the validity of the stipulation exempting the defendant from liability for negligence must be determined by the laws of New York, within whose jurisdiction the

contract was made and to be executed ; and as the plaintiff, under his contract, could have no right of action in the courts of New York, so his action cannot be maintained in this State."

In *Railway Company v. Ranney*, 37 Ohio St. 665, McIlvaine, J., said (page 669) : " The principles of law in relation to the liability of a master for an injury to his servant while engaged in the performance of duties under his employment, have been so frequently considered and declared by this court, and upon such varied statements of fact, that one might be justified in assuming that the law upon this subject, in all its bearings, has been fully settled. The respective rights and duties of employer and employee, sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employee, and among other things, to exercise reasonable care in the selection of prudent fellow-servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow-servant or not, in the ordinary sense."

There is strong ground to contend that Judge McIlvaine states the rule correctly. But, however that may be, and whether the action of the plaintiff in error sounds in contract or tort, in either case we think it is to be governed by the law of Pennsylvania. If the acts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed ; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience ; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights. Nor is it material that the rules of Pennsylvania law that deny relief to plaintiff in error result from the adjudications of the courts of that State, instead of being legislative enactments. The rules of law established by judicial decisions are as binding as legislative enactments, until modified, or overturned by other decisions or legislative enactments binding within that jurisdiction.

In theory it may be true, that there is no common law of Ohio, or of Pennsylvania ; that the common law is one and the same in every State acknowledging its obligations, and that the decisions of one State are but evidence of it, not binding upon the courts of any other State ; but as matter of fact we know that in the application of the rules of the common law to the affairs of men, there is, unfortunately, in the several States a wide divergence ; and that it necessarily follows that acts and transactions, sufficient in one State to create a cause of action, will not produce that result in another, and in the administration of justice mere

theory must be made to yield to the truth as established by facts and experience.

Other questions were urged upon our consideration by counsel in argument, some, or all of which may be material upon the re-trial of the action, but they are not presented by the record in such manner as to authorize their consideration at this time, and will not be noticed.

*Judgment affirmed.*¹

BEACHAM v. PORTSMOUTH BRIDGE.

SUPREME COURT OF NEW HAMPSHIRE. 1896.

[Reported 68 *New Hampshire*, 382.]

CASE for negligence. Facts found by the court. The defendants own and possess a toll bridge over the Piscataqua River between Portsmouth and Kittery. On Sunday, April 29, 1894, the plaintiffs, having paid the required toll, were crossing the bridge, on a pleasure excursion, with a barge drawn by four horses, and while on the portion within the State of Maine one of the horses was injured by a defect in the bridge caused by the defendants' negligence. The plaintiffs seek to recover damages for the injury. The laws of Maine relating to the questions involved are a part of the case. A verdict in favor of the plaintiffs for \$150 was filed, which is to be set aside, and there is to be judgment for the defendants, if the action cannot be maintained. Otherwise there is to be judgment on the verdict.

CHASE, J.² If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts the same as in contracts, in respect to the legal effect and incidents of acts. Cool. Torts, 471; Sto. Conf. Law (7th ed.), § 307 d; *Mostyn v. Fabrigas*, Cowp. 161; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; s. c. L. R. 6 Q. B. 1, 28; *Smith v. Condry*, 1 How. 28; *Dennick v. Railroad*, 103 U. S. 11; *Walsh v. Railroad*, 160 Mass. 571; *Henry v. Sargeant*, 13 N. H. 321; *Laird v. Railroad*, 62 N. H. 254. Therefore, whatever would be a defence to this action if it had been brought in the State of Maine is a defence here, although it would not be, if the cause of action had arisen in this State.

¹ The authorities generally hold that the question whether an employee may sue his employer in tort depends upon the law of the place where the injury happened. If an action lies by that law, it may be maintained in a place the law of which would not create an action. *Chicago & E. I. R. R. v. Rouse*, 178 Ill. 132, 52 N. E. 951; *Walsh v. New York & New England Railroad*, 160 Mass. 571, 36 N. E. 584. Conversely, if the *lex loci* permits no action, none may be maintained anywhere. *Alabama G. S. R. R. v. Carroll*, 97 Ala. 126, 11 So. 803; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146; *Njus v. Chicago M. & S. P. Ry.* 47 Minn. 92, 49 N. W. 527.

In a Swiss case the dictum of the principal case was followed, and the employer's liability held to be governed by the law of the place of hiring. 19 *Clanet*, 1064 (Swiss fed. trib., 4 Mar. '92). — ED.

² Part of the opinion is omitted. — ED.

By section 20, c. 124, Revised Statutes of Maine, a person who travels on the Lord's Day, except from necessity or for charity, may be punished. Walking for exercise (*O'Connell v. Lewiston*, 65 Me. 34; *Davidson v. Portland*, 69 Me. 116), carrying a disabled person to a ride to give him the benefit of air and exercise (*Sullivan v. Railroad*, 82 Me. 196), and carrying a visitor home who insists upon going (*Buck v. Biddeford*, 82 Me. 433), come within the exception; but travelling for pleasure is an offence under the statute, and has the effect to disable the offender from recovering damages for an injury to his person or team while so travelling, caused by the negligence of another. *Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423; *Parker v. Latner*, 60 Me. 528; *Wheelden v. Lyford*, 84 Me. 114. . . .

The plaintiffs' injury having been received while they were travelling in the State of Maine upon a pleasure excursion on the Lord's day, prior to the enactment of the Maine statute of 1895, their rights are governed by the law of *Cratty v. Bangor*, and the other cases cited.

Verdict set aside. Judgment for the defendants.

LOUISVILLE AND NASHVILLE RAILROAD v. WHITLOW

COURT OF APPEALS OF KENTUCKY. 1897.

[Reported 43 *Southwestern Reporter*, 711.]

PAYNTER, J.¹ While T. P. Whitlow was in the service of the appellant as brakeman on one of its trains he is alleged to have been killed by gross and wilful negligence of the servants and employees of the appellant in charge of the train. At the time of his death he was a resident of this State, and his father qualified as his personal representative in the Warren County court. That the personal representative had the right to maintain the action, if the liability existed under the laws of Tennessee, cannot be questioned. *Bruce's Adm'r v. Railroad Co.*, 83 Ky. 174; *Wintuska's Adm'r v. Railroad Co. (Ky.)*, 20 S. W. 819. He seeks to recover by virtue of the statute of Tennessee authorizing a recovery when death results from the wrongful act, fault, or commission of another, and the law as settled in that State in the administration of the statute. It is a well-settled principle in all civilized countries, so far as we are aware, that in matters *ex contractu* the *lex loci contractus* governs the construction and the validity of the contract, and that the *lex fori* governs the remedy. . . .

We can see no reason why the doctrine as established as to actions *ex contractu* may not be applied to actions *ex delicto*. There seem to be but few decisions on the question. In the case of *Nonce v. Railroad Co.*, 33 Fed. 434, it was held that there is no distinction on the subject

¹ Part of the opinion is omitted. — Ed

between actions *ex contractu* and *ex delicto*. *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413, was an action *ex delicto*, and the court held that the law of the place where the right was acquired or the liability incurred governs as to the right of action, while all that pertains merely to the remedy is controlled by the law of the State where the action is brought, thus recognizing the principle as the same where the right of action is *ex contractu* or *ex delicto*. The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet if the defendant was guilty of negligence which was the direct and proximate cause of the intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable should be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence, under our rule, is never applied to the mitigation of damages. The question is whether the contributory neglect relates to the right or to the remedy. . . .

From all the facts attending the injury, it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee must govern in fixing the liability and the quantum of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery. It would be stranger still for the court to hold that the law of Tennessee should govern in fixing the liability; then apply the law of Kentucky, which would prevent a recovery, although a recovery is authorized by the law of Tennessee. It would be in one breath declaring the Tennessee law should determine the liability, and in the next instance adjudging that Kentucky law shall determine the liability and defeat a recovery. Suppose that, under the laws of this State, contributory negligence was not available in an action for the negligent killing of a human being, but in Tennessee it was. Could it be said, in an action brought in this jurisdiction for the negligent killing in Tennessee, that the law in that State allowing such a plea was not available as a defence because it related, not to the right of action, but to the remedy? It could not be said it pertained to the remedy. It would be a fact that would in part determine the question of liability or of the right of action. The conduct of the intestate is part of the facts from which the liability of the defendant is fixed, and measures the relief to which the personal representative is entitled. *Bruce's Adm'r v. Railroad Co.* was an action under the Tennessee statute. The court said: "We are of the opinion the action cannot be maintained and recovery had in this State in the same manner, for the same cause, and to the same extent as if the action had been brought and prosecuted in the State of Tennessee, where the cause of action arose." If contributory negligence is available to defeat a recovery in this case, then the

plaintiff cannot recover in the same manner and to the same extent as if the action had been brought in Tennessee. *Railroad Co. v. Graham's Adm'r*, 98 Ky. 688, 84 S. W. 229, was an action under the statute of Alabama for a negligent killing. The court held that the measure of damages, as determined by the decisions of the Alabama Supreme Court, should be applied in the case. The case of *Johnson v. Railroad Co.*, 91 Iowa, 248, 55 N. W. 66, is cited by counsel for appellant to sustain his contention that Kentucky law of contributory negligence should prevail. The injury in that case occurred in Illinois, and the action was brought in Iowa. The doctrine of comparative negligence prevailed in Illinois, and the Iowa court refused to follow the rule. The court disposed of the question in a few lines as to whether the doctrine of comparative negligence which had been established by the decisions of the courts of Illinois should prevail in that case. Kinne, J., took no part in the decision. Robinson, J., expressed no opinion on the question, but said that it was not necessarily involved in a determination of the case. *Knight v. Railroad Co.*, 108 Pa. St. 250, and *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413, are cited by the court to sustain its conclusion. In neither of these cases cited was the same question involved which the Iowa court adjudged, nor was there a similar question involved in them. The question in *Knight v. Railroad Co.* presents the right to maintain an action against a foreign corporation to recover damages in an action *ex delicto* for negligence causing the death in another State. The court held that such an action could be maintained. The Pennsylvania court recognized the correctness of the doctrine of *Herrick v. Railroad Co.*; and the court in the latter case said: "Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any State which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the State where it is sought to be enforced. . . . The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases, the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." Of course, there is no question of public policy involved in the case, because we have a statute of the same general import of the statute of Tennessee. *Dennick v. Railroad Co.*, 103 U. S. 11, was an action for injuries resulting in death, and the court held it was transitory. The court said: "It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or statute law of a State, a right

of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." At the time the injury was inflicted the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this State, cannot be applied so as to alter or affect the right of action which arose in Tennessee. For these reasons the judgment is affirmed.¹

WOODEN *v.* WESTERN NEW YORK AND PENNSYLVANIA RAILROAD.

COURT OF APPEALS, NEW YORK. 1891.

[*Reported 126 New York, 10.*]

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this State, and the defendant, a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of twenty thousand dollars.

The demurrer interposed raised two objections: first, that the statutes of the two States were not similar, but different; and, second, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased: and the final result sought to be established was that the widow could not maintain an action in this State because that is contrary to our statute, and that the administratrix could not because that is contrary to the Pennsylvania statute: and so, there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been

¹ *Acc. Bridger v. Asheville & S. R. R.*, 27 S. C. 456, 3 S. E. 860; *Ry. v. Lewis*, 89 Tenn. 235, 14 S. W. 603. — ED.

explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci* because they are permitted by the common law which is presumed to exist in the foreign State; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action and are similar to our own.

Upon the question of similarity we have also held that the two statutes need not be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 53. It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out.

The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow, while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddle*, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest, those whose injury is redressed, whose right is vindicated, to whom all damages go, are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that even in that event the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so, should have been brought by the plaintiff not as widow, but as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity.

84 N. Y. 53, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori* and measure it by and compare it with the *lex loci*, I think, for two reasons: one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action: and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. *Usher v. West Jersey R. Co.*, 126 Penn. St. 207.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed five thousand dollars. That restriction pertains to the remedy rather than the right. *Dennick v. Central Railroad of New Jersey*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements or character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principal of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be, there very possibly is, an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment.

That judgment should be affirmed with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the remittitur, and upon payment of the costs of the action from the interposition of the demurrer to that date.

All concur.

*Judgment accordingly.*¹

NORTHERN PACIFIC RAILROAD v. BABCOCK.

SUPREME COURT OF THE UNITED STATES. 1894.

[Reported 154 United States, 190.]

THE plaintiff below, who was the administrator of the estate of Hugh M. Munro, sued in the District Court of the Fourth Judicial District of Minnesota to recover \$25,000 damages for the killing of Munro on the 10th day of January, 1888, at or near a station known as Gray Cliff on the Northern Pacific Railway in the Territory of Montana.

There was a verdict and judgment below in favor of the plaintiff for \$10,000. To review that judgment this writ of error was sued out. The errors assigned were as follows:

"Third. The court erred further in charging the jury as follows: 'Many States have different laws. The law in this State until recently was that only \$5,000 could be given in a case of death. It has lately been increased to \$10,000.'

"Fourth. The court erred further in charging the jury as follows: 'If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate. The law of Montana limits it to such an amount as you think it would be proper under all circumstances of the case, and that is the law which will govern in this case.'

"Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars.'"²

WHITE, J. The third, fourth, and sixth assignments involve the same question, and may be decided upon together.

¹ The right to recover damages for death is regulated by the law of the place of injury, not by that of the forum. *Louisville & N. R. R. v. Williams*, 113 Ala. 402, 21 So. 938; *Usher v. West Jersey R. R.*, 126 Pa. 206, 17 Atl. 597; *Goodman v. Ry.*, 14 Scot. L. R. 449.

The law of the place of injury rather than that of the place of death governs. *De Ham v. R. R.*, 86 Tex. 68, 23 S. W. 381; *Rudiger v. R. R.*, 94 Wis. 191, 68 N. W. 661. — ED.

² Only so much of the case as deals with these assignments of error is given. — ED.

The plaintiff's intestate was an engineer in the employ of the defendant corporation in the Territory of Montana, and the accident by which he lost his life occurred there. The law of the Territory of Montana at the time provided as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." (Section 14, title II., chapter I., first division of the Code of Civil Procedure of the Territory of Montana.)

Under the law of Minnesota, when the death occurred, the limit of recovery in case of death was \$5,000, but at the time of the trial of the case in the court below this limit had been increased to \$10,000 by amendment of the Minnesota statutes.

The question which those assignments of errors present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of *Herrick v. Minneapolis & St. Louis Railway Co.*, reported in 31 Minnesota, 11, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that State for a cause of action originating in Iowa a law of the State of Iowa making railroad corporations liable for damages sustained by its employees in consequence of the neglect of fellow-servants, the court said:

"The statute of another State has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*.

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text-writers — notably, Rorer on Interstate Law — seem to lay down this rule, but the authorities cited generally fail to sustain it.

"But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci*

contractus and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat, 66. In referring to that case in *Texas & Pacific Railway v. Cox*, 145 U. S. 593, the court said: "the courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury." The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick v. Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington v. Attrill*, 146 U. S. 657, 670. Indeed, in *Texas & Pacific Railway Co. v. Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: "The question, however, is one of general law, and we regard it as settled in *Dennick v. Railroad Co.*"

The contract of employment was made in Montana, and the accident occurred in that State, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.

THE "HALLEY."

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1868.

[*Reported Law Reports, 2 Privy Council, 193.*]

SELWYN, L. J. This is an appeal from an order by the judge of the High Court of Admiralty, dated the 26th of November, 1867, and admitting the third article of the reply filed by the plaintiffs in the court below, who are the present respondents.

The cause is a cause of damage promoted by the respondents as owners of a Norwegian barque called the "*Napoleon*," against a British steamship called the "*Halley*," and her owners, for the recovery of damages occasioned to the respondents by reason of a

collision which took place on the 8th of January, 1867, in Flushing Roads, between the "Napoleon" and the "Halley."

In their petition the respondents state that the collision was caused by the negligent and improper navigation of the "Halley."

The appellants, in their answer to that petition, state that the "Halley" is a steamship belonging to the port of Liverpool, and that "by the Belgian or Dutch laws which prevail in and over the river Scheldt, and to which the said river is subject, from the place where the said river pilot came on board the 'Halley,' and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and be navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws; and it was by virtue of such laws that the 'Halley' was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the defendants or their agents did not select and had no power of selecting;" and "that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the 'Halley,' except the said river pilot."

In reply to this answer, the respondents pleaded the following, being the third article in their reply: "By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision, are liable to pay and make good to the owners of such lastly mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly mentioned ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly mentioned ship to be navigated under the direction and in charge of such pilot; and the defendants, the owners of the 'Halley,' are by virtue of the said laws, liable to pay and make good to the plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The appellants having moved the court below to reject the third article of the reply, on the ground that, even if the third article were true, the appellants would not be liable in the Court of Admiralty in England, the learned judge of that court has made the order now under appeal, by which he has refused the motion of the appellants, and has sustained the third article of the reply.

The claim of the respondents is stated by the learned judge to be founded upon a tort committed by the defendants in the territory of a foreign State, and we are not called upon to pronounce any opinion as to the rights which the respondents might have obtained, either against the appellants as the owners of the "Halley," or as against the ship, if the respondents had instituted proceedings and obtained a judgment in the foreign court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in England; and it is admitted by the counsel for the respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned judge in the court below, that the respondents are entitled to plead that the law of Belgium, within whose territorial jurisdiction the collision took place, renders the owners of the "Halley," although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned judge in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner.

This exemption of the owner from liability when the ship is under the control of what has been termed a "compulsory pilot" has also been declared by express statutory enactments. *Vide* Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 388.

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious, that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer.

Assuming, as, for the purposes of this appeal, their lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound

to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the master appointed by them; and their lordships think that the maxim, "*qui facit per alium, facit per se*," cannot by the law of England be applied, as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the appellants.

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the "Halley," if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English court of justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce any instance in which such a course had been taken by any English court of justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to *Mostyn v. Fabrigas*, in Smith's *Leading Cases*, vol. i. p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of "*The Amalia*," 1 Moore's P. C. Cases (N. S.) 484, Lord Chelmsford, in delivering the opinion of the judicial committee, said: "Suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a court of law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the court would be bound to administer."

As Mr. Justice Story has observed in his *Conflict of Laws*, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of the other nations or to those of their subjects." And even in the case of a foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the courts of England may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognized in England or other foreign countries, or is founded upon a misapprehension of what is the law of England. *Simpson v. Fogo*, 1 H. & M. 195.

It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their lordships' opinion, alike contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of *Smith v. Condry*, 1 Howard's Rep. (U. S.) 28, in the Supreme Court of the United States, appears at first sight to have an important bearing upon this case; but, upon an investigation of the report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior court, and there is no report of the arguments.

Their lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the respondents; and, on the whole, they think it their duty humbly to advise Her Majesty to allow this appeal, and to order that the third article of the plaintiff's reply be rejected, and that there should be no costs of this appeal.¹

THE "SCOTLAND."

SUPREME COURT OF THE UNITED STATES. 1881.

[*Reported 105 United States, 24.*]

BRADLEY, J.² The steamship "Scotland," belonging to the National Steam Navigation Company, a corporation of Great Britain, sailed from New York for Liverpool, on the 1st of December, 1866, with

¹ See *The Augusta*, 57 L. T. Rep. 326. — Ed.

² Part of the opinion is omitted. — Ed.

freight and passengers ; and after reaching the high sea, opposite Fire Island light, ran into the American ship "Kate Dyer," bound from Callao, in the republic of Peru, to New York, laden with a cargo of of guano. The "Kate Dyer" immediately sank, and ship and cargo were totally lost. The steamship suffered so severely from the collision that she put back, but was unable to get further than the middle ground outside and south of Sandy Hook, where she also sank and became a total loss, with the exception of some stripping of ship's material, consisting of anchors, chains, rigging, and cabin furniture got from her by the Coast Wrecking Company before she went down. Libels *in personam* were filed in the District Court for the Eastern District of New York, against the Steam Navigation Company by the owners of the "Kate Dyer," the Peruvian government, owner of her cargo, and by a passenger and some of the crew who lost certain effects by the sinking of the ship. Personal service of process not being obtainable, the marshal attached another vessel belonging to the steamship company, lying in the port of New York, which was duly claimed and released on stipulation, and the steamship company appeared and responded to the libel. The answer admitted the collision, but denied that the "Scotland" was in fault, and further alleged as follows : " Respondents further answering say, that said steamer 'Scotland' was by said collision sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the 'Kate Dyer.' " Proofs being taken, the District Court rendered a decree in favor of the libellants, which, on appeal to the Circuit Court, was substantially affirmed. The owners of the "Kate Dyer" were awarded \$56,000, with interest ; the owners of the cargo, \$57,875, with interest ; and the passengers and crew, upwards of \$11,000 with interest.

On the trial in the Circuit Court, the respondents, besides contesting the question of fault and general liability, again insisted upon the benefit of the limited liability law, and proposed for adoption by the court a certain finding of fact and conclusion of law looking to that end. The finding of fact was substantially adopted by the court as follows :

" The steamer was, by reason of the said collision and in consequence thereof, so injured that, although at once put about, she could only reach the 'outer middle,' so called, on the west side of the channel south of Sandy Hook, where she sank and became a total loss, except that a large amount of anchors, chains, rigging, and cabin furniture, of the value of several thousand dollars, was saved from her and delivered to the agent of the respondents. She earned no freight, the voyage being broken up. The passage-money paid in advance by the passengers was \$1,703.65 ; of this \$225 was refunded to such of them as could not wait to be transported by the respondents in another vessel of their line ; the remaining passengers were forwarded by the 'Queen,' and the expense charged to the 'Scotland.' Irrespective of the carriage of the passengers by the 'Queen,' the respondents paid return money as above, \$225, and the expenses of bringing the passengers to

New York, and taking care of them before they were reshipped, \$566.83, in all, \$791.83; the balance of the passage-money, \$911.82, was credited to the 'Queen' and charged to the 'Scotland.'

The conclusion of law proposed and insisted on by the respondents as legitimately arising upon this fact was as follows, to wit:

"The liability of the respondents, as owners of the said steamship 'Scotland,' did not extend beyond the value of their interest in the vessel and her pending freight at the time of the collision; and the vessel having been lost by the collision, and no freight or passage money earned, the respondents are thereby discharged from any liability on account thereof."

The Circuit Court, as before stated, refused any relief grounded on the limited liability law, but made a decree against the respondents for the total amount of damages sustained by the various parties in interest. To this conclusion the respondents excepted.

Both parties appealed from the decree, and the case is now before us for review. The appeal of the libellants was based on what they supposed to be an erroneous conclusion of the court in reference to the allowance of interest, and the estimation of the value of the cargo.

The principal question raised and argued on this appeal is, whether the steamship company is entitled to the benefit of a limited responsibility equal to the value of the steamship and freight after the collision occurred,—a liability which, in this case, as the vessel and freight were a total loss, would only amount to the value of the articles saved by the wrecking company. It is contended by the company that it is entitled to the benefit of such limitation, either under the general maritime law or under the act of Congress of March 3, 1851, c. 43. On the other side, it is contended that the general maritime law on this subject (if there be any) is not in force in this country, and that the benefit of the act of Congress cannot be claimed by foreign vessels. It is further contended by the libellants that the steamship company, even if it might have had the benefit of the rule, failed to take the proper steps for obtaining it,—first, in not filing a petition according to the rules of this court; and, secondly, in not surrendering the property recovered from the wreck, or its proceeds.

In the case of *Norwich Company v. Wright*, 13 Wall. 104, we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end. This rule is laid down in several places in the ancient code called the *Consolato del Mare*, and in many other authorities which are quoted and commented upon by Judge Ware in the case of "*The Rebecca*," Ware, 187; and it is specifically formulated in various national ordinances and codes, amongst others, in the *Marine Ordinance of Louis XIV.*, adopted in 1681. Emerigon, in his treatise of Contracts "*à la Grosses*," says: "The owners of the ship are bound *in solidum* by everything which the captain does in the course of the

voyage for the promotion of the voyage. . . . But this action *in solidum* does not exist against the owners farther than according to the interest which they have in the body of the ship; hence, if the ship perish, or if they abandon their interest, they are no longer liable for anything. It is thus that the maritime laws of the Middle Age have directed; such is the law which is observed in the North; and such is the regulation of our own ordinance:" and he refers to the Consolato and other authorities. The text of the French ordinance, which is regarded as merely formulating the old customary law, is as follows: "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute. The English statutes, indeed, have not yet adopted, to its full extent, the maritime law on this subject. They make the owners responsible to the value of ship and freight at the time of the injury (that is, immediately before the injury), although the ship be destroyed, or injured by the same act, or afterwards in the same voyage; whilst our law adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port, and the freight actually earned; and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsibility equivalent to the value of the ship and freight as rescued from the disaster.

But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana*, 21 Wall. 558, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such. Then, does it govern the present case?

In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was.¹ If not shown,

¹ It is generally held that a marine tort occurring within the territorial waters of a State, even upon or between vessels of other States or of the forum, is governed by

we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly.¹ If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charterparty, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.

The act of Congress creating a limited responsibility of shipowners in certain cases, first passed March 3, 1851, and reproduced in sects. 4282-4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that "the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employees, but risk only the amount of their capital stock in the corpor-

the law of the State within whose waters it occurs. *The Moxham*, 1 P. D. 43; *Smith v. Condry*, 1 How. 28; 17 Clunet, 963 (Cass. Florence, 26 Nov. '88); 20 Clunet, 902 (Germany, 9 July, '92); 23 Clunet, 130 (Cass. France, 18 July, '95).

But see *In re State S. S. Co.*, 60 Fed. 1018. — ED.

¹ *Acc. Kendrick v. Burnett*, 35 Scot. L. R. 62. — ED.

ation. The doctrine of *respondet superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of shipowners, "Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master." *Jure B. & P.*, lib. 2, c. 11. § 13.

But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases. We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor.

English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which in generality of terms were similar to our own, did not apply to foreign ships. See *The Nostra Signora de los Dolores*, 1 *Dod.* 290; *The Carl Johan*, cited in *The Dundee*, 1 *Hagg. Adm.* 109, 113; *The Girolamo*, 3 *Hagg. Adm.* 169, 186; *The Zollverein*, 1 *Swa.* 96; *Cope v. Doherty*, 4 *Kay & J.* 367; *s. c.* 2 *DeG. & J.* 614; *The General Iron Screw Collier Co. v. Schurmanns*, 1 *John. & H.* 180; *The Wild Ranger*, 1 *Lush.* 553. We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign States, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty.

The English courts say that, as foreigners are not subject to their

law, nor entitled to its benefits, they will resort to the general law of general liability when foreigners are litigants before them. Where do they find such general law? In the law of nature? or the civil or common law? Is not the maritime law, as their own legislature or national authority has adopted it, as imperative as either of these? Does it not, in the British judicial conscience, stand for the law of nature, or general justice? As for the civil and common laws, they are only municipal laws where they have the force of laws at all. The better grounds for the English decisions seem to be the peculiar terms of the acts of Parliament on the subject, and the supposed policy of those acts, as being intended for the encouragement of the British marine. From these considerations, as grounds of construction, the conclusion may have been properly deduced that the law was intended to be confined to British ships. The question, it is true, has ceased to be of practical importance in England, since the act of 1862 (25 & 26 Vict., c. 63), by which the owners of any ship, British or foreign, are not to be answerable, without their actual fault or privity, for any loss or damage to person or property, to an amount exceeding £15 per ton of the ship's registered tonnage, or its equivalent in case of foreign ships. But the former English decisions are thought to have a bearing on our law, because the acts of Parliament to which they related, in their principal clauses, were conceived in the same broad and general terms as our act of Congress. Some of the clauses of the British acts, however, relating to registered tonnage and other particulars, admitted only a special application to British ships; and perhaps these clauses did require a restricted construction of the whole acts to such ships.

But there is no demand for such a narrow construction of our statute, at least of that part of it which prescribes the general rule of limited responsibility of shipowners. And public policy, in our view, requires that the rules of the maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule, and the mode of enforcing it, are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicile. We think they should not be restricted by construction. Our opinion, therefore, is that in this case the National Steamship Company was entitled to the benefit of the law of limited responsibility.¹ . . .

¹ *Acc.* The *Leon*, 6 P. D. 148; The *Belgenland*, 114 U. S. 355; 17 Clunet, 332 (Hamburg, 24 Sept. '88); 20 Clunet, 221 (Antwerp, 23 July, '92). In France the responsibility for a collision is said to be governed by the law of the offending vessel. 19 Clunet, 153 (Cass. 4 Nov. '91): It has been held in Scotland that for collision on the high seas no action will lie, unless the collision was tortious by the law which governed both vessels. *Kendrick v. Burnett*, 35 Scot. L. R. 62.

In the case of salvage, it has been held that the right is governed by the law of the salvaging vessel. 11 Clunet, 512 (French Cass. 6 May, '84); 16 Clunet, 720 (Antwerp 9 March, '89.) — Ed.

CHAPTER X.

OBLIGATIONS EX CONTRACTU.

SECTION I.

PLACE OF CONTRACTING.

BARING *v.* INLAND REVENUE COMMISSIONERS.

COURT OF APPEAL. 1897.

[Reported [1898] 1 *Queen's Bench*, 78.]

THE question raised was whether an unregistered bond, of which the appellant, the Honourable J. Baring, was the holder, whereby the Atchison, Topeka and Santa Fé Railway Company, a corporation organized under the laws of Kansas, in the United States (hereinafter called the new company), promised to pay to bearer, or, if the bond should be registered as thereafter provided, to the registered holder thereof, the sum of 1,000 dollars with interest thereon at the rate of 4 per cent per annum until the principal became due, was subject to duty under the Stamp Act, 1891, as being a marketable security by or on behalf of a foreign company made or issued in the United Kingdom within s. 82, sub-s. (b), (i.), of that act.¹

A. L. SMITH, L. J. I am of opinion that this appeal should be dismissed. It is not necessary for me to state the facts in detail. They may be summarized as follows. There was a company called the Atchison, Topeka and Santa Fé Railway Company, incorporated under the law of Kansas. In 1895 that company was in difficulties, and a reorganization scheme was set on foot. By that scheme there was to be a foreclosure suit against the old company, which was to be wound up, a new company was to come into existence in its stead, and the bondholders of the old company were to become bondholders of the new company. The scheme was carried out in 1896. The new company, in pursuance of the scheme, issued bonds, the form of which is very material. There is an express stipulation on the face of the bond that it shall not be valid for any purpose unless authenticated by the certificate thereon indorsed of the trustee under the mortgage or deed

¹ The statement of facts and arguments of counsel are omitted. — Ed.

of trust. The document seems to me on the face of it not really to be a bond, but a mere piece of paper till that certificate is signed. What happened in this case was this. One of these documents was sent from New York to London in order that it might be handed over to the appellant, who, as having been a bondholder of the old company, was entitled to a bond of the new company. Instead, however, of converting the document into a bond in New York, in order to avoid the payment of a heavy premium for insurance, it was sent over here as an inchoate instrument, and not a bond at all, and the vice-president of the trust company also came over to this country to sign the requisite certificate here and so convert the document into a bond. The certificate having been thus signed, the bond was delivered to Messrs. Baring Brothers & Co., and by them handed over to the appellant. The question which arises is, where was this bond issued? It was contended that it was issued in New York when the piece of paper was given to the trust company. I say certainly not. It is true that a piece of paper was then handed to the trustee, but it cannot be said that a bond was then issued, for it was not. I do not think there can be an issue of an instrument within the statute until it is an actual, valid, subsisting instrument. I think that this bond was first issued in this country after it became a valid instrument by the signing of the indorsed certificate thereon, until which time it was a mere piece of paper and not a bond. I cannot understand how it can be said that a bond has been issued before it is a bond. It became a marketable security when the certificate was signed, and not till then. For these reasons I think that the appeal should be dismissed.

RIGBY, L. J.¹ I am of the same opinion. The sole question really appears to me to be whether this instrument, which came into the hands of the appellant as the person entitled to it under the scheme of reorganization, was issued in this country or not, and I cannot entertain any doubt that it was so issued. What is the meaning in any fair sense of the word "issued" in the section? Of course a document is not issued if, when sealed, it is put away in a box and kept there. Nor do I consider that a document, even if it were complete when signed, could be said to be issued, if it were handed over to an agent with instructions that he was not to part with it or make it an instrument on which any one could sue until some consideration was received, as in the case of an ordinary mortgage deed which is sealed but is not to be handed over to the mortgagee or to become an effective mortgage deed until the mortgage money is paid. It seems to me impossible to argue that in such cases there could be said to be an issue in America, even if the document were complete when signed, if it were only to be handed over to the person who was to sue upon it upon something being done, as, for example, on paying the consideration money. An instrument can only be said to be issued in my opinion when it gets into the hands of a

¹ Part of this opinion and the concurring opinion of COLLINS, L. J., are omitted.
— Ed.

person who can avail himself of it. It seems to me that that is the ordinary meaning of the word "issued," and at any rate its meaning in the act which we have to construe. When this document was executed by the company in America, had everything been done that was necessary to make it an available instrument? Certainly not. On the contrary, it was guarded by a condition on the face of the document that it should have no validity until certified by the trust company. It was argued that, as the trust company were dealing with the matter under the orders and directions of the joint executive committee, the bond had gone beyond the control of the railway company, and that constituted the test as to whether it had been issued. I cannot accede to that view. In the instance which I gave of an instrument being sent to an agent with instructions to deliver it to a person on payment of the consideration money, the instrument would be beyond the control of the sender in the sense in which this bond was beyond the control of the railway company. The company had a bargain which was to be fulfilled, and, unless it were fulfilled, they could not get the advantages for which they had bargained. During the transmission of the document from New York, and until the certificate was signed, no one could sue on it. Until the certification there could be no issue. I do not say that there was an issue upon the certification; but when the certified bond, being then a complete instrument, which might be sued upon if handed over to a person who was entitled to it, was handed over to such a person, I do not doubt there was an issue. There can be only one issue within the meaning of the act, and that is when the instrument first gets into the hands of some one who can make it available for his benefit.¹

NORTHAMPTON MUTUAL LIVE STOCK INSURANCE
CO. v. TUTTLE.

SUPREME COURT, NEW JERSEY. 1878.

[*Reported 40 New Jersey Law, 476.*]

VAN SYCKEL, J.² The plaintiff brought suit before a justice of the peace of the county of Warren, to recover the amount of an assessment made against the defendant upon a policy of insurance issued to him by the plaintiff company. The plaintiff recovered a judgment before the justice, which was reversed in the Warren Common Pleas, on the ground that the insurance company, plaintiff, was a foreign insurance

¹ *Acc. Aultman v. Holder*, 68 Fed. 467. The place of delivery of a bond or negotiable instrument is the place of contracting, not the place where the instrument is written or signed. *Young v. Harris*, 14 B. Mon. 556; *Watson v. Lane*, 52 N. J. L. 550, 20 Atl. 894; *Pugh v. Cameron*, 11 W. Va. 523.—ED.

² Part of the opinion is omitted.—ED.

company, and that the contract was a New Jersey contract, negotiated by an agent in New Jersey, contrary to our statute. Nix. Dig. 435, § 66; Ib. 436, § 73.

The policy was dated May 27, 1872, and insured defendant for the term of one year. An assessment was made July 2, 1872, which paid the company's losses to that date. The losses from July 2, 1872, to January 14, 1873, amounted to about \$12,000, and this sum was the basis of the assessment for which the defendant was sued.

The property insured was in this State, where the defendant and Thatcher, one of the directors of the insurance company, resided when the policy was issued.

The application was signed by the defendant in this State, where Thatcher gave him a receipt, of which the following is a copy:

“Northampton Mutual Live Stock Insurance Company, of Northampton County, Pa.

“Received of Wm. Tuttle, for an insurance by the Northampton Mutual Live Stock Insurance Company against loss by death upon the animals described in application, the sum of one dollar and thirty cents, being the amount paid for membership for the term of one year from the 27th day of May, 1872, for which said company agrees to issue a policy to said applicant when the application is approved, and if not approved, the above amount to be refunded to the said applicant.

“J. B. THATCHER,

“Dated May 27, 1872.

Agent.”

Article VI. of the by-laws of the company provided that the agent of the company should give a receipt for the premium paid, and that the insurance should take effect from that time, provided the application was approved by the board of directors, or its executive committee, after which the policy would be issued; and if not approved, the money would be refunded.

In this case the application for insurance was taken by Thatcher to Easton, in the State of Pennsylvania, where it was approved by the directors of the company, and the policy was there issued and sent by mail to the defendant, in New Jersey.

If the contract of insurance was made in the State of Pennsylvania, and was valid there, comity requires us to enforce it here. *Columbia Ins. Co. v. Kinyon*, 8 Vroom, 33.

This case, therefore, turns upon the question whether it was made in this State.

Thatcher acted as the agent of the company, with authority to receive applications. He received the defendant's application, with the premium, which he transmitted to the company at its place of business in Pennsylvania. By the express terms of the receipt given by the agent to the defendant, the company had the option to approve the application and issue a policy, or to reject it and refund the premium.

It was a mere proposition, from which the parties might have receded, and not a contract. Approval by the company was necessary to ripen it into a contract. Not until then did the minds of the parties come together, and invest the transaction with the attributes of a valid agreement. The contract of insurance must be regarded as having been made when the company approved the defendant's application, and issued and transmitted to him their policy. *Hyde v. Goodnow*, 3 N. Y. 266; *Huntley v. Merrill*, 32 Barb. 626.

The contract must be held to have been made where the last act necessary to complete it was done.

Although there is some conflict in the cases, I think the weight of authority is, that when the offer of the insured was accepted, and the policy deposited in the post office by the company, properly addressed to the insured, the contract was made. It did not remain incomplete until the insured, by receiving the policy, was notified of the acceptance of his proposal. . . .

It being conceded that the approval of the application was given in Pennsylvania, and the policy mailed there, the contract must be adjudged to have been made in that State, and not in New Jersey. The contract, therefore, is valid, and comity requires its enforcement here. *Columbia Fire Insurance Co. v. Kinyon*, 8 Vroom, 33. . . .

The judgment of the Warren Pleas, that the contract was void under the statute law of this State, was erroneous, and should be set aside.¹

EQUITABLE LIFE ASSURANCE SOCIETY *v.* CLEMENTS.

SUPREME COURT OF THE UNITED STATES. 1891.

[*Reported 140 United States, 226.*]

THIS was an action brought by Alice L. Wall, a citizen of Missouri and widow of Samuel E. Wall, and prosecuted by Benjamin F. Pettus, her administrator, against the Equitable Life Assurance Society of the United States, a corporation of New York and doing business in Missouri, on a policy of insurance executed by the defendant at its office in the city of New York on December 23, 1880, upon the life of Samuel E. Wall, by which, in consideration of the payment of \$136.25 by him, and of the payment of a like sum on or before December 15 in each year during the continuance of the contract, it promised to pay to Alice L. Wall, his wife, \$5,000 at its office in the city of New York, within sixty days after satisfactory proofs of his death.² . . .

¹ *Acc. Com. Mut. Fire Ins. Co. v. Wm. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. 516; *Hyde v. Goodnow*, 3 N. Y. 266. See *Voorheis v. Peoples' Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109; *Davis v. Ins. Co.*, 67 N. H. 218, 34 Atl. 464; *Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969. — ED.

² The statement of facts and part of the opinion are omitted. — ED.

GRAY, J. Upon the question whether the contract sued on was made in New York or in Missouri, there is nothing in the record, except the policy and application, the petition and answer, by which the facts appear to have been as follows: The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy, executed at the defendant's office in New York, provides that "the contract between the parties hereto is completely set forth in this policy and the application therefor, taken together." The application declares that the contract "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Missouri Rev. Stat. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri; and the answer admits that the policy was, "at the request of the said Wall, transmitted to the State of Missouri and was delivered to said Wall in said State." If this form of admission does not imply that the policy was at the request of Wall transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri. . . .

It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State, or not," is an ineffectual attempt to evade and nullify the clear words of the statute.

*Judgment affirmed.*¹

¹ *Acc. Hicks v. Ins. Co.*, 60 Fed. 690; *Ford v. Ins. Co.*, 6 Bush, 133; *Cromwell v. Ins. Co.*, 49 Md. 366; *Fidelity Mut. L. Ass. v. Ficklin*, 74 Md. 172, 21 Atl. 680; *Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Estate of Breitung*, 78 Wis. 33, 46 N. W. 891. — ED.

STAPLES v. NOTT.

COURT OF APPEALS, NEW YORK. 1891.

[*Reported 128 New York, 403.*]

GRAY, J. The promissory note in suit bears date at Washington, D. C., April 5, 1889; was made payable at a bank in Watertown, N. Y., and carried interest at the rate of seven per cent per annum. The appellant was indorser upon it, and defends on the ground of usury. If the contract of the parties, which is evidenced by this note, was governed by the laws of this State, the defence should have prevailed; but if made under the laws of the District of Columbia the judgment was right and should be sustained.

The note was given in renewal of a balance due upon a prior note, made by and between the same parties, which bore date at Washington, D. C., April 5, 1888; was payable one year after date at a bank in Washington; bore the same rate of interest and was similarly indorsed. Some payments were made on account of the principal, but, before its maturity, the maker requested of plaintiff, a resident of Washington, by letter, to renew for the balance remaining due. Failing to receive any reply, he went on to Washington and there prevailed upon the plaintiff to agree to take a new note for his debt. This note was then drawn by the plaintiff and handed to the maker for execution, who took it back to his home in Syracuse, N. Y., where his and the appellant's signatures were affixed, as maker and indorser respectively. It had been agreed with the plaintiff that, upon this new note being returned to him, he would send back the original note, and the appellant himself mailed the renewal note to the plaintiff in Washington.

These facts, which were not disputed, should make it perfectly obvious that there was here every essential to a valid contract under the laws of the plaintiff's domicil, and the only accompaniment lacking to a full local coloring was the foreign place named for payment. For the affixing of the signatures to the note by the maker and the indorser, however important as acts, was yet but a detail in the performance and execution of the contract which had been agreed upon with the plaintiff. But naming a New York bank as the place where the maker would provide for the payment of the note did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions, which resulted in an agreement to extend the time for the payment of the debt and to accept a new note, took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere neither added to nor altered the agreement of the parties. Though the engagement of the indorser, in a sense, was independent of that of the maker, that proposition is one which does not affect the local character of the contract, but which simply concerns the question of the

enforcement of the indorser's liability. Whatever the previous knowledge of the appellant, as to the negotiations and the agreement for a renewal of the promise to pay between the maker of the old note and the plaintiff, the question is without importance. When he indorsed the note, which had been prepared and was brought to him, and sent it through the mail to the plaintiff, his engagement was with respect to a contract validly made according to the laws of the District of Columbia, and when the note was received by the plaintiff the transaction was then consummated in that place. In *Lee v. Selleck*, 38 N. Y. 615, it was said, with respect to an indorsement in Illinois of a note made in New York, that the fact of the indorser writing his name elsewhere was of no moment. Upon delivery by his agent to the plaintiffs in New York, it became operative as a mutual contract.

The agreement, which was made in Washington for the giving of the promissory note in question, was the forbearance of a debt already due, upon which the appellant was liable; and the renewal of his engagement as indorser upon the note, without any qualification of his contract of indorsement, was in fact an act in ratification and execution of the previous agreement. That agreement between the plaintiff and the maker in Washington took its concrete legal form in a note, prepared there by the plaintiff, with a rate of interest sanctioned by the laws of his domicile, adopted by the appellant by indorsement in blank, and made operative as a mutual contract by delivery to plaintiff in Washington through the mails.

For the court to hold, because the note was not actually signed and indorsed in the District of Columbia, where the agreement, it evidenced, was made, or because it was made payable in another State, that the contract was void as contravening the usury laws of the place of signature and of payment, would be intolerable and against decisions of this court. *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566; *Western T. & C. Co. v. Kilderhouse*, 87 N. Y. 430; *Sheldon v. Haxtun*, 91 N. Y. 124.

I think the plaintiff was entitled to recover, as upon a contract made under the government of the laws of the District of Columbia, and, therefore, valid and enforceable in any State.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ *Acc. Findlay v. Hall*, 12 Oh. S. 610. See *Bascom v. Zediker*, 48 Neb. 380, 67 N. W. 148; *Rowland v. B. & L. Ass.*, 115 N. C. 825, 18 S. E. 965; *Mills v. Wilson*, 88 Pa. 118.

In an ordinary case, where a note is sent by mail by the maker to the payee, the contract is made at the place of mailing. *William Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Barret v. Dodge*, 16 R. I. 740, 19 Atl. 530.

A contract to guaranty a debt is made where the debt is created. *Alexandria, A. & F. S. R. R. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Milliken v. Pratt*, 125 Mass. 374, *supra*, p. 11; *John A. Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; and see *S v. Williams*, 46 La. Ann. 922, 15 So. 290. — Ed.

MACK v. LEE.

SUPREME COURT OF RHODE ISLAND. 1881.

[Reported 13 Rhode Island, 293.]

DURFEE, C. J. This is assumpsit to recover \$312.50 for five barrels of whiskey sold by the plaintiff, a trader in New York, to the defendant, a retail dealer in Woonsocket, in this State. The sale was made in pursuance of an order addressed by the defendant to the plaintiff in New York for the whiskey to be sent to the defendant by the Stonington Line on three months' credit. The whiskey was delivered in New York for transportation by the Stonington Line to the defendant in Woonsocket, he paying the freight. It appeared, on cross-examination of the plaintiff's witnesses, that the order for the whiskey was obtained by one Levy, a travelling agent for the plaintiff, who visited the defendant at his place of business in Woonsocket, having samples of liquors with him, and there solicited the order. There was also some evidence that Levy offered to sell the whiskey to the defendant, at Woonsocket, though the plaintiff and Levy also testified that Levy had no authority to negotiate sales for the plaintiff, but only to obtain orders, which the defendant would fill or not, according to his own judgment. After the introduction of the plaintiff's testimony, the defendant moved that the plaintiff be nonsuited, on the ground that an offer in Rhode Island to sell the whiskey was in violation of Pub. Laws R. I. cap. 508, § 18, of June 25, 1875, and that therefore under § 44 of this chapter the plaintiff could not recover. The court granted the motion. The plaintiff excepted and petitions for a new trial for error in the ruling.

We think the court erred. The sale was consummated in New York when the plaintiff delivered the whiskey there to the Stonington Line in execution of the defendant's order. *Schlesinger & Blumenthal v. Stratton*, 9 R. I. 578. The sale therefore, independently of Levy's offer, if he made any offer, was clearly valid. In what way did Levy's offer, if he made any offer, make it invalid? If the offer was an offer to sell in New York, it was not a violation of cap. 508, § 18, for § 18 only prohibits an offer to sell by sample or otherwise when it is an offer to sell "in violation of the preceding sections;" i. e., when it is an offer to sell in Rhode Island. But if the offer was an offer to sell in Rhode Island, then the offer was neither accepted by the defendant nor carried out by the plaintiff, for the order given by the defendant and executed by the plaintiff was an order for whiskey to be sold and delivered in New York, and we do not see, therefore, how the offer, though in itself it may have been criminal, can be held to have infected the sale with criminality or to have prejudiced the plaintiff's right to recover on it.

*Exceptions sustained.*¹

¹ *Acc. Atlantic Phosphate Co. v. Ely*, 82 Ga. 438; *S. v. Colby*, 92 Ia. 463, 61 N. W. 187; *Clafin v. Mayer*, 41 La. Ann. 1048; *Boothby v. Plaisted*, 51 N. H. 436. See *Rindskopf v. DeRuyter*, 39 Mich. 1. — Ed.

PERRY v. MOUNT HOPE IRON COMPANY.

SUPREME COURT OF RHODE ISLAND. 1886.

[Reported 15 *Rhode Island*, 380.]

DURFEE, C. J.¹ This is an action to recover damages of the defendant corporation for refusing to receive a cargo of "bolt and nut scrap and boiler-plate" iron, so called, which the plaintiff claims the defendant agreed to buy at the rate of 87½ cents per hundred, delivered at its works in Somerset, Mass. Upon trial in the Court of Common Pleas, the jury found a verdict for the plaintiff. The case is before us on the defendant's petition for a new trial for alleged misrulings, and on the ground that the verdict was against the evidence and the weight thereof. The plaintiff lives and does business in Providence. The defendant is a Massachusetts corporation, having its business establishment in Somerset, Mass. Job M. Leonard is treasurer, and has an office in Boston. He makes purchases for the defendant. On the trial in the court below, the plaintiff put in testimony to show that his agent visited Leonard April 30, 1885, and informed him that the plaintiff had the "nut and bolt shop scrap," and solicited an offer for it; that Leonard offered 87½ cents per hundred, delivered at the company's wharf, and the agent asked him to let the offer stand until the next day, which Leonard agreed to do; and that the next day the plaintiff telegraphed from Providence to Leonard in Boston, accepting the offer. The defendant did not admit that the offer was made as stated, and made the point that, if it was so made, the contract was not completed by the acceptance until the acceptance reached him in Boston, and that consequently the alleged contract was a Massachusetts contract, and, not being in writing, was invalid under the Massachusetts Statute of Frauds, which was put in proof. The court below ruled the point against the defendant, holding that the contract was completed in Rhode Island by sending the telegram. The defendant cites a few cases which support its position. *McCullough v. Eagle Insurance Co.*, 1 Pick. 278; *British and American Telegraph Co. v. Colson*, L. R. 6 Exch. 103; *Langdell's Cases on Contracts*, §§ 1-18; *Langdell's Summary of Contracts*, §§ 14-16. But the weight of authority strongly supports the instruction given by the court. 1 *Addison on Contracts*, *18, note 1, and cases there cited; *Maclay v. Harvey*, 32 Am. Rep. note on p. 40. This note contains a full report of the recent English case, *Household Fire and Carriage Accident Insurance Co. v. Grant*, L. R. 4 Exch. Div. 216. The case was decided in the Court of Appeal July 1, 1879, by Thessiger and Bagallay, L.JJ., Bramwell, L. J., dissenting. Its doctrine is, that the contract is binding on the proposer as soon as a letter accepting the proposal, properly directed to him, is

¹ Part of the opinion is omitted. — Ed.

posted by the recipient, whether it reaches the proposer or not, if posted without unreasonable delay, and the post is the ordinary and natural mode of transmitting the acceptance. In that case the letter did not reach the proposer, and Bramwell, L. J., who dissented, conceded that, "where a posted letter arrives, the contract is complete on posting." In the case at bar the arrival of the telegram is not disputed. We are of opinion that the contract, if made, was completed in Rhode Island and is a Rhode Island contract, notwithstanding it was to be performed in Massachusetts. *Hunt v. Jones*, 12 R. I. 265. If there be any question that the telegraph is a natural and ordinary mode of transmitting such an acceptance, that is a question of fact for the jury; but we are of opinion that, if it be shown that the acceptance duly reached the defendant, the question of the mode, no mode having been specified, is immaterial.¹

WORCESTER BANK v. WELLS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1844.

[*Reported 8 Metcalf, 107.*]

ASSUMPSIT on an alleged acceptance of a bill of exchange, and on an alleged promise to accept it. The bill declared on was this:—

"FARNUMSVILLE, March 3d, 1842.

"Six months after date, pay to the order of Peter Farnum, fifteen hundred dollars, value received, which place to account of

"Your obt. servts.

"FARNUM & WRIGHT.

"To Messrs. Wells & Spring, New York."

The parties submitted the case to the court, on the following agreed statement: On the 3d of March, 1842, and for some years previous thereto, Farnum & Wright, the drawers of the bill declared on, were manufacturers of cloth, at a place called Farnumsville, in Grafton, in this county. On that day, they forwarded thirty-eight bales of shirting to the defendants, commission merchants in the city of New York, to be sold by them for the benefit of the drawers. On the same day, said Farnum & Wright drew the bill declared on, and sent, per mail, an invoice of the goods, with notice of the said bill, to the defendants, who were domiciled in New York. On the same day, said Farnum & Wright offered the said bill, indorsed in blank by Peter Farnum, one of the drawers, at the banking-house of the plaintiffs, for discount, stating all the foregoing facts, and assuring the plaintiffs that the bill would

¹ *Acc. Garrettson v. North Atchison Bank*, 47 Fed. 867; *Tillinghast v. B. & P. R. Lumber Co.*, 39 S. C. 484, 18 S. E. 120. See 12 Clunet, 456 (*Cass. Florence*, 2 Feb. '83); 18 Clunet, 1026 (*Cass. Turin*, 13 Jan. '91.) — ED.

be duly honored. They had previously, at sundry times, drawn bills on the defendants, which had been discounted by the plaintiffs under the same circumstances, which the defendants had accepted and paid. Whereupon the plaintiffs discounted the bill declared on, of which \$500 were paid to the drawers, and the balance was carried to their credit as a deposit. The next week, \$500 more were paid to the drawers, as part of their said deposit. The balance has never been paid nor demanded; the drawers becoming bankrupts soon after the second payment, to wit, on the 10th or 12th of said March. On the 16th of said March, the plaintiffs, not knowing of the writing or the existence of the letter of acceptance hereafter mentioned, indorsed the bill, by their cashier, and transmitted it to a bank in New York, and that bank caused said bill to be protested for non-acceptance, and, at the maturity thereof, caused it to be protested for non-payment.

On the 8th of March, 1842, the defendants wrote the following letter to the drawers:—

“NEW YORK, March 8th, 1842.

“Messrs. Farnum & Wright:

“Gentlemen: We have your two favors, 25th ult. and 3d inst., with invoice of 38 bales shirtings, which shall on arrival receive our best attention.” (Here were inserted remarks on the dull state and prospects of the market.) “As our market now stands, we should prefer not advancing over 4½ cents on your shirtings. We hope to get, of course, much more than will cover this price; but we wish to feel ourselves secure under any state of things. Your draft for \$1,500 will be duly accepted; but in future shipments, please draw at the rate of 4½ cents per yard. We will duly advise you, as we progress in sales.

Yours, etc.

WELLS & SPRING.”

This letter was mailed at Providence, R. I., and received by said drawers at Grafton, on the 10th or 11th of the same month, and was afterwards delivered by them to the plaintiffs, as evidence of the acceptance of said bill.

The following statutory provisions are in force in the State of New York: “No person within this State shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who on the faith thereof shall have received the bill for a valuable consideration.” 1 Rev. Sts. of New York, Part II. c. IV. Tit. II. §§ 6, 7.¹

WILDE, J. Upon the facts agreed, the general question is, whether there has been a valid acceptance of the bill declared on; and that depends on two other questions, which have been ably argued by the counsel. The first is, whether the contract of acceptance was made in this commonwealth, or in the State of New York. The second is,

¹ Arguments of counsel are omitted. — Ed.

whether the validity of the contract of acceptance is to be determined by the law here, or by the law of New York.

The first question is, we think, settled by the principles laid down in *Carnegie v. Morrison*, 2 Met. 381. In that case, the defendants' agent in Boston contracted, in their behalf, with John Bradford, that they would accord a credit in his favor, on the usual terms and conditions, for the sum of £3,000 sterling. The letter of credit was forwarded to the plaintiffs, who were merchants in Gottenburg, requesting them to draw on the defendants, who were bankers in London, for that amount; which was accordingly done. That case, and another involving the same principles, were ably argued by counsel and fully considered by the court. It was decided that the letter of credit was a contract made in this State; and we consider that decision, and the principles laid down therein, as conclusive of the present question. If this case differs from that, the difference is more favorable to the defendants; for in that case the contract was to be performed in a foreign country, and in this, the defendants' contract was made and to be performed in New York. It was argued for the plaintiffs, that the defendants' letter, promising to accept the bill, was not a completion of the contract until it was received by the drawers, Farnum & Wright. But we do not so consider it. When the defendants agreed to their request, and put their letter in the mail, the contract, we think, was complete. If the defendants made any binding promise, it was made in New York, and to be performed there. A presentment of the bill for payment here would not have been a good presentment. If the validity of the contract is to be determined by the law of New York, it is clear that the defendants are not liable as acceptors. By the statute referred to, a promise to accept, in a letter, or on any other paper than the bill itself, is not an acceptance, where the party has not taken the bill on the faith of such promise. And it is agreed that this bill was discounted by the plaintiffs without any knowledge of the letter of acceptance.

The second question to be decided is, whether the validity of the contract is to be determined by the *lex loci* or the *lex fori*; and this question, we think, is clearly settled, although there have been conflicting decisions as to the revenue laws of a foreign State. But those decisions are distinguishable from cases of other contracts. They refer to contracts made in one country, to be executed in contravention of the revenue laws of a foreign State, and not to contracts made in a foreign State, to carry on smuggling against its laws. Judge Story is of opinion that contracts of the latter description would be void everywhere, and his opinion seems to us to be founded on well-established principles, and is only seemingly inconsistent with the doctrine that a court cannot take notice of the revenue laws of a foreign State. The cases in which this doctrine has been held were not founded on contracts made in contravention of its laws, and therefore are not inconsistent with the general principle, that a contract, void by the law of the place where it is made, is void everywhere. Judge Story remarks,

that this is as clearly settled as anything can be; and we think the remark is fully supported by the authorities and well-established principles. Story on Bills, § 137, and Conflict of Laws, § 242. In *Williams v. Wade*, 1 Met. 82, it was decided that a note made in Illinois and indorsed there, was a contract to be governed by the law of that State.

We are therefore of opinion that the defendants are not by law liable as acceptors; and it is quite certain that the plaintiffs cannot maintain their action on the defendant's promise to accept. That is a chose in action, not negotiable or assignable, so as to enable the assignees to maintain an action in their own names.

Plaintiffs nonsuit.

HILL v. CHASE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1886.

[Reported 143 *Massachusetts*, 129.]

MORTON, C. J. The only question presented by this bill of exceptions is whether the presiding justice of the Superior Court, who tried the case without a jury, was justified in finding that the contract sued on was made in this State.

It appeared in evidence that the defendant, a married woman living in Salem in the State of New Hampshire, in the summer of the year 1864, employed her sister, Mrs. Shirley, to borrow for her fifty dollars of Mr. Hill, her brother, living in Salem in the State of Massachusetts. Mr. Hill declined to lend the money, but the plaintiff, his wife, out of her own money, delivered to Mrs. Shirley fifty dollars, together with a paper, of which the following is a copy:

"Salem, July 1, 1864. Borrowed and received from Nancy D. Hill the sum of fifty dollars.

"Sign this and return it."

Mrs. Shirley carried the money and paper to the defendant, who took and kept the money, signed the paper, knowing its contents, and returned it to the plaintiff at Salem in this State.

The presiding justice was justified in finding that, according to the understanding and purpose of the parties, the plaintiff lent to the defendant, through her agent, Mrs. Shirley, the sum of fifty dollars at Salem in Massachusetts; and that the defendant ratified the acts of her agent. There is no evidence which shows that the plaintiff employed Mrs. Shirley as her agent to lend money for her in New Hampshire. The justifiable inference from all the evidence is, that the parties intended that the transaction should be in form, what it was in substance, a loan by the plaintiff to the defendant, the plaintiff assuming, what the evidence shows to have been true, that the defendant had no choice as to the person of whom she borrowed, and that she would ratify the act of her agent.

This being so, the fact that the paper was signed in New Hampshire is immaterial. The contract of loan being made in this State, upon the condition that the paper should be signed and returned to the plaintiff in this State, the paper became operative as evidence of the contract when it was delivered to the plaintiff in this State. *Lawrence v. Bassett*, 5 Allen, 140; *Milliken v. Pratt*, 125 Mass. 374.

We are therefore of opinion, that the Superior Court was justified in refusing to rule that the contract sued on was made in New Hampshire, and in the finding that it was made and to be performed in Massachusetts, and therefore is to be governed by the laws of this State.

*Exceptions overruled.*¹

BERNHEIM v. RAAZ.

COURT OF CASSATION, TURIN. 1891.

[Reported 18 *Clunet*, 1026.]

THE defendant (the plaintiff in error), a merchant of Milan, ordered certain cloth by letter from the establishment of Raaz in Zullickau, Prussia. Raaz shipped the goods, but on arrival Bernheim refused to receive them.

Art. 321 of the German *Handelsgesetzbuch* provides: "A contract made between persons at a distance from each other is deemed complete from the moment when the acceptance of the offer is despatched to the other party."

Art. 36 of the Italian Code of Commerce decrees that: "A bilateral contract between persons absent from each other is complete only when the acceptance comes to the knowledge of the promisor, within the time fixed by him, or within the time ordinarily necessary for exchange of the offer and acceptance, taking into account the nature of the contract and the general usages of commerce."

THE COURT. The ground of error alleged by the plaintiff, that the Italian law was wrongly applied to a contract made at Zullickau, in conformity with the German Commercial Code there in force and applicable to the case, is not sound.

To determine the place where the contract became perfect by the meeting of the minds of the parties it is necessary, in view of the conflict between the Italian and German laws, to determine which of these was chosen by the parties as the law to regulate their agreement. The judgment below at once discards the German law, on the ground that it is to be presumed that the plaintiff, a resident of Milan and the offeror,

¹ *Acc. Van Reimsdyk v. Kane*, 1 Gall. 371, 377 (*semble*); *Dord v. Bonaffée*, 6 La. Ann. 563; and see *Golson v. Ebert*, 52 Mo. 260, 271.

In *Shuenfeldt v. Junkermann*, 20 Fed. 357, where the contract was void by the law of the place where the agent acted, but valid by the law of the place of ratification, it was held that the contract was made at the place of ratification. — Ed.

intended in the absence of evidence of a contrary intention, to act under his own national law; and that this was unreservedly accepted as the law to regulate the contract by the promisee, since he invokes it to demand the execution of the agreement. Now since it is necessary, by reason of the divergence between the national laws of the contracting parties, to refer to one law or the other to determine the juridical moment of forming the contract, it is quite clear that the solution of the question depends entirely upon the intention of the parties. To discover this, in default of express manifestation of it, one must depend on presumptions, the most legitimate of which is the adoption by the party who began negotiations of his own law, which was accepted by the contracting foreigner when he applied to it to obtain the performance of the contract.¹

SECTION II.

FORMALITIES.

CLEGG v. LEVY.

NISI PRIUS. 1812.

[Reported 3 Campbell, 166.]

To an action for goods sold and delivered, the principal defence set up was a partnership between the plaintiff and defendant in respect to the goods in question. To prove this, an unstamped agreement was put in, which had been signed by the parties at Surinam. The witness who proved the plaintiff's signature to it, had resided as a merchant in Surinam, and stated that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect.

LORD ELLENBOROUGH. I should clearly hold, that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of Surinam upon this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own stamp act, as to agreements for the sale of goods, wares, and merchandises. In the case of *Bohtlingk v. Inglis*, 3 East, 381, and see 1 East, 515, respecting the right to stop *in transitu* in Russia, Lord Kenyon required the

¹ See 22 Clunet, 141 (Colmar, 19 May, 1893). — Ed.

written law of Russia upon this subject to be given in evidence. I will therefore admit this agreement to be read, unless you prove in the same way that by the law of Surinam a stamp was necessary to give it validity.

The agreement was read accordingly, but did not apply to the goods in question; and the plaintiff had a verdict.¹

SCUDDER v. UNION NATIONAL BANK.

SUPREME COURT OF THE UNITED STATES. 1875.

[Reported 91 *United States*, 406.]

HUNT, J.² Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.:—

“CHICAGO, July 7, 1871.

“\$8,125.00.

“Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of

“LELAND & HARBACH.

“To Messrs. Henry Ames & Co., St. Louis, Mo.”

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the seventh day of July, 1871, shipped to them at St. Louis, five hundred barrels of pork, and gave their check on the Union Bank to Hancock, the seller of the same, for \$8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against five hundred barrels of pork that day bought by Leland & Harbach for them,

¹ If the law of the place of contracting makes an unstamped agreement void, suit cannot be brought upon it in any jurisdiction. *Alves v. Hodgson*, 7 T. R. 241; *Satterthwaite v. Doughty*, Busbee, 314; *Fant v. Miller*, 17 Gratt. 47 (*semble*). But if the agreement by the law of the place of contracting cannot be received in evidence, but is otherwise valid, suit may be brought upon it elsewhere. *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Gratt. 47; *Rennels v. Dearsley*, Pasic. Belge, 1877, 2, 146. The requirement of registration at the place of contracting is treated in the same way. *Ex parte Melbourne*, L. R. 6 Ch. 64. See *Guepratte v. Young*, 4 De G. & Sm. 217. — ED.

² Part of the opinion only is given. — ED.

and duly shipped to them. The clerk returned to the bank, and made this statement to its vice-president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wharton on Conflict of Laws, § 401 *p*, the rule is thus laid down:—

“Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law.”

Miller v. Tiffany, 1 Wall. 310; Chapman v. Robertson, 6 Paige, 634; Andrews v. Pond, 13 Pet. 78; Lamesse v. Baker, 3 Wheat. 147; Adams v. Robertson, 37 Ill. 59; Ferguson v. Fuffe, 8 C. & F. 121; Bain v. Whitehaven and Furness Junction Ry. Co., 3 H. L. Cas. 1; Scott v. Pilkinton, 15 Abb. Pr. 280; Story, Conf. Laws, 203; 10 Wheat. 383.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his “Treatise on Notes and Bills,” uses this language: “If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated.” P. 324.

For the purposes of payment, and the incidents of payment, this is

a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young v. Harris*, 14 B. Mon. 556; *Parry v. Ainsworth*, 22 Barb. 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Hatch*, 4 Zab. 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Shelden*, 12 Wend. 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent interest, which is legal in that State, the note is valid, although but seven per cent interest is allowed by the laws of the former State. *Miller v. Tiffany*, 1 Wall. 310; *Depeau v. Humphry*, 20 Mart. 1; *Chapman v. Robertson*, 6 Paige, 634; *Andrews v. Pond*, 13 Pet. 65.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the

bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson v. First Nat. Bank*, 48 Ill. 39; *Mason v. Dousay*, 35 Ill. 424; *Jones v. Bank*, 34 Ill. 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne v. Raikes*, 5 East, 514; *Bank of Ireland v. Archer*, 11 M. & W. 383; *How v. Loring*, 24 Pick. 254; *Ward v. Allen*, 2 Met. 53; *Bank v. Woodruff*, 34 Vt. 92; *Spalding v. Andrews*, 12 Wright, 411; *Williams v. Winans*, 2 Green (N. J.), 309; *Storer v. Logan*, 9 Mass. 56; *Byles on Bills*, § 149; *Barney v. Withington*, 37 N. Y. 112. See the Illinois cases cited, *supra*. . .

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

*The judgment must be affirmed.*¹

HUNT v. JONES.

SUPREME COURT OF RHODE ISLAND. 1879.

[Reported 12 *Rhode Island*, 265.]

DURFEE, C. J. This is assumpsit for damages for breach of contract. On trial to the jury the plaintiff submitted testimony to show that on 20th of July, 1876, at Providence, in Rhode Island, he sold to the defendant, or entered into an oral agreement with the defendant to sell him, two hundred barrels of Canaan lime at \$1.60 per barrel, to be delivered at the foot of Spring Street in the city of New York, the lime then being in process of manufacture in Canaan, Conn., and that subsequently, in pursuance of the contract, the lime was shipped to and delivered at the foot of Spring Street in New York City, and notice given of its delivery to the defendant, but that the defendant refused to accept it. The lime was afterwards sold at a loss and this action brought to recover damages.

¹ Acc. *Matthews v. Murchison*, 17 Fed. 760; *Mason v. Dousay*, 35 Ill. 424. — Ed.

The defendant submitted in evidence a statute of the State of New York, which provides that "every contract for the sale of any goods, chattels, or thing in action, for the price of fifty dollars or more, shall be void, unless a note or memorandum of such contract be in writing and be subscribed by the parties to be charged thereby, or unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action, or unless the buyer shall at the time pay some part of the purchase-money."

The defendant thereupon requested the court to charge the jury, that as the contract was to be performed in the State of New York, its validity and construction were to be judged by the law of the place of performance, to wit, New York, and that therefore, the contract being void in New York, the plaintiff could not recover. The court refused to charge as requested, but did charge that the plaintiff could recover upon the contract, if otherwise entitled, notwithstanding the contract was not in writing, the contract being valid in Rhode Island, the place where it was made. To this charge the defendant excepted, and now petitions for a new trial, the jury having returned a verdict against him.

The case presents the question whether the validity of a contract, in respect of the form or mode of contracting, depends on the law of the place where it is made or on the law of the place where it is to be performed; or, indeed, whether the contract, if it conforms to either law, may not be enforced. No question is made but that the contract in suit is valid in Rhode Island, if resort may be had to the law of Rhode Island to determine its validity.

There is some conflict and confusion of authority on the question, but in the recent decision of *Scudder v. Union National Bank*, 1 Otto, 406, Mr. Justice Hunt, in delivering the unanimous judgment of the Supreme Court of the United States, holds the following language, to wit: "Matters bearing upon the execution, the interpretation, and the *validity* of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." Accordingly, in *Scudder v. Union National Bank* the court held that a bill of exchange drawn in Illinois upon a firm in Missouri, and orally accepted in Illinois, where such an acceptance is valid, was binding upon the drawees, though an acceptance in Missouri would not have been binding unless made in writing.

Where a contract is entered into in one State to be performed in another, there are, it has been said, two *loci contractus*, the *locus celebrati contractus* and the *locus solutionis*; and the law of the former governs the interpretation, nature, and validity of the contract, that of the latter its performance. A contract, however, may be valid by the law of both places, and yet fail practically, if the *lex fori* does not permit its enforcement. *Leroux v. Brown*, 12 C. B. 801.

The rule thus laid down, considered as a rule for personal contracts, though it is at variance with many *dicta* and decisions, is well supported on authority. *Dacosta v. Davis*, 24 N. J. Law, 319; *Cooper v. Waldegrave*, 2 Beav. 282; *Vidal v. Thompson*, 11 Mart. La. 23; *Aymar v. Sheldon*, 12 Wend. 439; *Chapman v. Robertson*, 6 Paige, 627, 634; *Bain v. Whitehaven, &c. Railway Co.*, 3 H. L. 1; *Van Reimsdyk v. Kane*, 1 Gall. 371; *Wharton, Conflict of Laws*, § 401, p. 676; *Story, Conflict of Laws*, § 234, *seq.*

There are cases which go farther and hold that a contract made in good faith in one State to be performed in another, will be upheld if it conforms to the law of either State. In making such contracts, it is argued, the parties may have in view either the law of the State where the contract is made or the law of the State where it is to be performed; and therefore the contract, if made in good faith without any design to evade the law, ought to be allowed and enforced according to its presumable intent, *ut res magis valeat quam pereat*. This rule has been applied especially to stipulations for interest on contracts for the payment of money, and is commended by Professor Parsons as reasonable and just. *Fisher v. Otis*, 3 Chand. 83; *Depeau v. Humphreys*, 8 Mart. N. s. La. 1; *Cromwell v. County of Sac*, 6 Otto, 51; *Bolton v. Street*, 3 Cold. 81; 2 Parsons, Contracts, 583; *Wharton, Conflict of Laws*, § 507.

The case at bar, however, involves the validity of the contract in matter of form rather than of substance, and seems to fall more appropriately under the former rule than the latter; but it is immaterial whether the former or the latter is applied, for the contract in suit is valid under either of them.

We think the charge of the court should be sustained and a new trial denied.
*Petition dismissed.*¹

¹ *Acc. Hubbard v. Exchange Bank*, 72 Fed. 234; *Park Brothers & Co. v. Kelly Axe Mfg. Co.*, 49 Fed. 618; *Houghtaling v. Bell*, 19 Mo. 84; *Dacosta v. Davis*, 4 Zab. 319; 7 Clunet, 480 (French Cass. 24 Aug. '80). So of a contract for the sale of real estate, valid where made. *Wolf v. Burke*, 18 Col. 264, 32 Pac. 427; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111.

Conversely, if the statute of frauds at the place of contracting deprives the contract of validity, it cannot be enforced in another State. *Denny v. Williams*, 5 All. 1; *Allshouse v. Ramsay*, 6 Whart. 331.

On the other hand, if the statute of frauds of the forum goes to the remedy, it will be applied to contracts made elsewhere and valid where made. *Leroux v. Brown*, 12 C. B. 801; *Heaton v. Eldridge*, 56 Oh. S. 87, 46 N. E. 638.—Ed.

HALL v. CORDELL.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 142 United States, 116.]

THE case was stated by the court as follows:—

This was an action of assumpsit. It was based upon an alleged verbal agreement made on or about April 1, 1886, at Marshall, Missouri, between the defendants in error, plaintiffs below, doing business at that place as bankers, under the name of Cordell & Dunnica, and the plaintiffs in error, doing business at the Union Stock Yards, Chicago, Illinois, under the name of Hall Bros. & Co. There was a verdict and judgment in favor of the plaintiffs for \$5,785.79.

The alleged agreement was in substance that Hall Bros. & Co. would accept and pay, or pay on presentation, all drafts made upon them by one George Farlow, in favor of Cordell & Dunnica, for the cost of any live stock bought by Farlow and shipped by him from Missouri to Hall Bros. & Co. at the Union Stock Yards at Chicago.

There was proof before the jury tending to show that, on or about July 13, 1886, Farlow shipped from Missouri nine car-loads of cattle and one car-load of hogs, consigned to Hall Bros. & Co. at the Union Stock Yards, Chicago; that such cattle and hogs were received by the consignees, and by them were sold for account of Farlow; that out of the proceeds they retained the amount of the freight on the shipment, the expenses of feeding the stock on the way and at the stock yards, the charges at the yards and of the persons who came to Chicago with the stock, the commissions of the consignees on the sale, the amount Farlow owed them for moneys paid on other drafts over and above the net proceeds of live stock received and sold for him on the market, and two thousand dollars due from Farlow to Hall Bros. & Co. on certain past-due promissory notes given for money loaned to him; that at the time of the above shipment Farlow, at Marshall, Missouri, the place of agreement, made his draft, of date July 13, 1886, upon Hall Bros. & Co., at the Union Stock Yards, Chicago, in favor of Cordell & Dunnica for \$11,274, the draft stating that it was for the nine car-loads of cattle and one car-load of hogs; that this draft was discounted by Cordell & Dunnica, and the proceeds placed to Farlow's credit on their books; that the proceeds were paid out by the plaintiffs on his checks in favor of the parties from whom he purchased the stock mentioned in the draft, and for the expenses incurred in the shipment; that the draft covered only the cost of the stock to Farlow; that upon its presentation to Hall Bros. & Co. they refused to pay it, and the same was protested for non-payment; and that, subsequently, Cordell & Dunnica received from Hall Bros. & Co. only the sum of \$5,936.55, the balance of the proceeds of the sale of the above cattle and hogs, consigned to them as stated, after deducting the amounts

retained by the consignees, out of such proceeds, on the several accounts above mentioned.

The contract sued upon, having been made in Missouri, the defendant contended that it was invalid under the statutes of that State, which are cited in the opinion of the court, *infra*, and could not be made the basis for a recovery in Illinois. This contention being overruled, the defendant excepted, and (judgment having been given for the plaintiff) sued out this writ of error.¹

HARLAN, J. Our examination must be restricted to the questions of law involved in the rulings of the court below. And the only one, which, in our judgment, it is necessary to notice is that arising upon the instructions asked by the defendant, and which the court refused to give, to the effect that the agreement in question, having been made in Missouri, and not having been reduced to writing, was invalid under the statutes of that State, and could not be recognized in Illinois as the basis of an action there against the defendants. . . .

The contention of the plaintiffs in error is that the rights of the parties are to be determined by the law of the place where the alleged agreement was made. If this be so, it may be that the judgment could not be sustained; for the statute of Missouri expressly declares that no person, within that State, shall be charged as an acceptor of a bill of exchange, unless his acceptance be in writing. And the statute, as construed by the highest court of Missouri, equally embraces, within its inhibitions, an action upon a parol promise to accept a bill, except as provided in section 537. *Flato v. Mulhall*, 72 Mo. 522, 526; *Rousch v. Duff*, 35 Mo. 312, 314. But if the law of Missouri governs, this action could not be maintained under that section; because, as held in *Flato v. Mulhall*, above cited, the plaintiffs, being the payees in the bill drawn by Farlow upon Hall Bros. & Co., could not, within the meaning of the statute, be said to have "negotiated" it. The Missouri statute is a copy of a New York statute, in respect to which Judge Duer, in *Blakeston v. Dudley*, 5 Duer, 373, 377, said: "We think, that to negotiate a bill can only mean to transfer it for value, and that it is a solecism to say that a bill has been negotiated by a payee, who has never parted with its ownership or possession. The fact that the plaintiffs had given value for the bill when they received it, only proves its negotiation by the drawer — its negotiation to, and not by them. . . . Their putting their names upon the back of the bill was not an indorsement, but a mere authority to the agent whom they employed, to demand its acceptance and payment. The manifest intention of the legislature in § 10 [similar to § 537 of the Missouri statutes] was to create an exception in favor of those who, having transferred a bill for value, on the faith of the promise of the drawee to accept it, have, in consequence of his refusal to accept, been rendered liable and been subjected to damages, as drawers or indorsers." The plaintiffs in error, therefore, cannot rest their case upon section 537.

¹ Arguments of counsel and part of the opinion are omitted. — ED.

We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that State can have no application to an action brought to charge a person in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the State of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101, and the authorities there cited. In this connection it is well to state that in *New York & Virginia State Stock Bank v. Gibson*, 5 Duer, 574, 583, a case arising under the statute of New York, above referred to, the court said: "Those provisions manifestly embrace all bills, wherever drawn, that are to be accepted and paid within this State, and were the terms of the statute less explicit than they are, the general rule of law would lead us to the same conclusion: that the validity of a promise to accept a bill of exchange depends upon the law of the place where the bill is to be accepted and paid," citing *Boyce v. Edwards*, 4 Pet. 111.

Looking, then, at the law of Illinois, there is no difficulty in holding that the defendants were liable for a breach of their parol agreement, made in Missouri, to accept and pay, or to pay upon presentation, in Illinois, the bills drawn by Farlow, pursuant to that agreement, in favor of the plaintiffs. It was held in *Scudder v. Union National Bank*, 91 U. S. 406, 413, that, in Illinois, a parol acceptance of, or a parol promise to accept, upon a sufficient consideration, a bill of exchange, was binding on the acceptor. *Mason v. Donsay*, 85 Ill. 424, 433; *Nelson v. First Nat. Bank of Chicago*, 48 Ill. 36, 40; *Sturgis v. Fourth National Bank of Chicago*, 75 Ill. 595; *St. Louis National Stock Yards v. O'Reilly*, 85 Ill. 546, 551.

The views we have expressed were substantially those upon which the court below proceeded in its refusal of the defendants' requests for instructions, as well as in its charge to the jury. The suggestion that there was a material variance between the averments of the original and amended declaration, and the proof adduced by the plaintiffs, is without foundation. The real issue was fairly submitted to the jury, and their verdict must stand.

Judgment affirmed.

MR. JUSTICE GRAY was not present at the argument and did not participate in the decision.¹

¹ *Acc. Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959. — ED.

VALERY v. SCOTT.

COURT OF SESSION, SCOTLAND. 1876.

[*Reported 3 Court of Sessions Cases, 4th Series, 965.*]

THIS was an action by Count Joseph Valery, partner of the firm of Valery Frères et Fils, shipowners, Marseilles and Paris, against John Scott, partner of the firm of Scott and Company, shipowners, Greenock, for payment of £4,864, and interest.

The pursuer averred: "On 28th July, 1870, the firm of Valery Frères et Fils, and the firm of Scott and Company, entered into and executed in duplicate in Paris a contract in the French language, whereby the firm of Scott and Company undertook to build for and supply to the firm of Valery Frères et Fils eight new iron screw packet boats." . . . (Cond. 3). "Simultaneously with entering into the said contract, the defender undertook and agreed to pay to the pursuer commission at the rate of two per cent upon the amount of the said contract, and at the same time with the execution of the said contract the defender wrote and signed and delivered to the pursuer a letter or obligation in the French language, of which the following is a copy and accurate translation: —

"PARIS, the 27 July, 1870.

"Monsieur Joseph Valery, — As has been agreed between us, I engage myself to give to you two per cent upon the amount of the contract for the eight new packet boats for which I have signed a contract to-day.

"Yours truly,

"JOHN SCOTT."

He averred that the contract was executed, and the price paid, and that the commission amounted to the sum concluded for.

In answer to Cond. 3 the defender stated: "The said letter is not duly stamped; and according to the law of France, where said letter was written and granted, it is essential that the said letter should be stamped in order to make it valid and binding as an obligation."

He pleaded: (1) The said letter falls to be considered and construed according to the law of France, where the same was made and granted, and by said law the said letter imposes no binding obligation upon the defender, but is null and void, in respect it is not duly stamped.

The Lord Ordinary pronounced this interlocutor: "Repels the first plea in law stated for the defender, and appoints the cause to be put to the roll for further procedure."

The defender reclaimed.¹

LORD PRESIDENT (INGLIS). I am of opinion that this is a Scotch contract. We have heard a great deal on the one side about the place of

¹ Arguments of counsel are omitted. — Ed.

making a contract, and a great deal on the other of the place of performing a contract. These are both circumstances to be taken into consideration as regards the nationality of a contract, but the place of performance is generally of more importance than the place of making.

The place of the making of a contract is in many cases indifferent. Take the case of two Scotchmen meeting in Paris, who contract regarding the disposal of a movable in Scotland. It is of no consequence that they happen both to be in Paris. I merely put this as an example of how unimportant the place of making a contract often is. But the place of performance of a contract is never unimportant, for parties must always see that the law of the place where the contract is to be performed must affect them very much. Now, I think this is a Scotch contract to all intents and purposes. One of the contracting parties is a Frenchman, but that makes no difference; he might just as well have been a German. The party who undertakes the obligation, who is to perform the contract, is a Scotchman, whose place of business is in Scotland, and this obligation is in direct connection with another contract, viz., that of building the steamers, and the measure of liability under this contract can only be found by means of reference to that other. Now, that other contract is for building ships in Greenock; the domicile, the residence, and the place of business of Scott are all Scotch. No place is contemplated in the contract except Greenock.

A good deal of misunderstanding has arisen from the way in which writers have treated this subject. By the term *locus contractus* is sometimes understood the place of making the contract, i. e., the place where it is actually made out and signed; but, in general, what is meant is the locality, as ascertained from the nature of the contract itself, and what is to be done under it. In this sense the civil law says, *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit*; that means, that the place of the contract is the place of performance. No doubt there are cases where the place of contracting is of importance, but generally the place of performing is of more. Here there is no room for serious argument on that point. Nothing here is French except the fact that the contracting parties happened to be in Paris. Of course the idea of a Scotch contract requiring a French stamp to make it binding is out of the question, and so I think the judgment of the Lord Ordinary should be affirmed.¹

The court adhered.

¹ The remainder of the opinion, and concurring opinions of Lord DEAS and Lord MURE are omitted. — ED.

SECTION III.

OBLIGATION.

ROBINSON v. BLAND.

KING'S BENCH. 1760.

[*Reported 2 Burrow, 1077.*]

THIS was a case reserved at Nisi Prius at Westminster Hall, before Lord MANSFIELD, 22d May, 1760.

The action was an action upon the case upon several promises, and the declaration contained three counts. The first count was upon a bill of exchange, drawn at Paris by the intestate, Sir John Bland, on the 31st of August, 1755, and bearing that same date, on himself, in England, for the sum of £672 sterling, payable to the order of the plaintiff ten days after sight, value received and accepted by the said Sir John Bland. The second count was for £700, moneys lent and advanced by the said plaintiff to the said Sir John Bland, at his request. The third count was for £700, moneys had and received by the said Sir John Bland, to and for the use of the plaintiff. And the plaintiff's damage is laid at £800.

The defendant pleaded the general issue, "That Sir John Bland did not undertake and promise," etc., and issue was joined thereon.

The verdict was found for the plaintiff, and £672 given for damages, subject to the following case stated for the opinion of the court, on the following facts proved and admitted, viz. :

That the bill of exchange was given at Paris for £300 there lent by the plaintiff to Sir John Bland, at the time and place of play; and for £372 more lost at the same time and place, by Sir John Bland, to the plaintiff, at play.

That the play was very fair; and there is not any imputation whatsoever on the plaintiff's behavior.

That there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland.

That in France, money lost at play, between gentlemen, may be recovered, as a debt of honor, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice.

That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice, there being no positive law against it.

That Sir John Bland was, and the plaintiff is, a gentleman.

The question was, Whether, under these circumstances, the plaintiff is entitled to recover anything, and what, against the defendant?

It was first argued on Tuesday, 17th June last, by Mr. Serj. *Hewitt* for the plaintiff, and Mr. *Blackstone* for the defendant; and again, yesterday and to-day, by Mr. *Wedderburn* for the plaintiff, and Mr. *Coxe* for the defendant.

Upon the conclusion of this second argument,

Lord MANSFIELD said, that in the present case, the facts stated scarce leave room for any question; because the law of France and of England is the same.

The first question is, Whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing.

The second question is, Whether he is entitled to recover upon the original consideration and contract, by the justice and equity of his case, exclusive of any assistance from the bill of exchange, and taking that to be a void security.

As to the first question, the defendant has objected: "That the consideration of the bill of exchange is wholly money won and lent at play. Therefore, by force of the writing, the plaintiff cannot by the law of England recover, such security being utterly void." And, no doubt, the law of England is so.

There are three reasons why the plaintiff cannot recover here, upon this bill of exchange.

First, The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Prælectiones, lib. 1, tit. 3, p. 34, is clear and distinct: "Veruntamen, etc. locus in quo contractus, etc. potius considerand', etc. se obligavit." Voet speaks to the same effect.

Now here, the payment is to be in England; it is an English security, and so intended by the parties.

Second reason: Mr. *Coxe* has argued very rightly: "That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England." The bill was drawn by Sir John Bland, on himself, in England, payable ten days after sight.

In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of lands, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

Third reason: The case don't leave room for a question. For the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there as well as here. And as to the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange.

This writing is, as a security, void (being for a gaming debt), both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear the plaintiff cannot recover upon that count.

Second question. Then as to the other counts, for money had and received to the plaintiff's use, and for money lent and advanced to him. — Consider it distinctly, as to each part: the money won, and the money lent.

First, As to the money won. By the rule of the law of England, no action can be maintained for it.

To this it has been objected, "That the contract was made in France. Therefore, *ex comitate*, the law of France must prevail, and be the rule of determination."

I admit, that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. This is a large field, and not necessary now to be gone into.

It has been laid down at the bar, "That a marriage in a foreign country must be governed by the law of that country where the marriage was had;" which, in general, is true. But the marriages in Scotland, of persons going from hence for that purpose, were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 83, and other writers.

No such case has yet been litigated in England, except one, of a marriage at Ostend, which came before Lord Hardwicke, who ordered it to be tried in the Ecclesiastical Court; but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial.

The point that the plaintiff must rest upon in the present case is this: "The money was won in France; therefore it ought to be governed by the law of France; and it is recoverable there before the marshals of France, who can enforce obedience to their sentence."

The Parliament of Paris would pay no regard to their judgment, nor carry it into execution. The marshals of France proceed personally against gentlemen, as to points of honor, with a view to prevent duelling.

They could not have taken cognizance of the present matter. It was not within their jurisdiction. It was no breach of honor in France, for the money was payable in England; and Sir John Bland could not be said to have forfeited his honor till the ten days were out, and till the money had been demanded in England, and payment refused there. Sir John Bland was actually dead in a very short time after he gave the note. The marshals of France can only proceed personally against the gentleman who loses the money, but have no power over his estate or representatives, after his death.

Therefore, as to the money won, the contract is to be considered as void by the law of France, as well as by the law of England; which

makes it unnecessary to consider "how far the law of France ought to be regarded."

Next, as to the money lent. The sense of the legislature seems to me to be agreeable to the cases that have been cited.

The act of 16 C. 2, c. 7, § 3, does not meddle with money lent at play. But, as to money (exceeding £100), lost, and not paid down at the time of losing it, it says, "That the loser shall not be compellable to make it good; but the contract and contracts for the same and for every part thereof, and all securities, shall be utterly void, etc." The words "contract and contracts for the same" are not in 9 Anne, and I dare say were designedly left out: it only says, "That all notes, bills, bonds, judgments, mortgages, or other securities, etc., for money won or lent at play, shall be utterly void," etc.

Here the money was fairly lent, without any imputation whatsoever. Sir John Bland, the borrower of it, being in a foreign country, might very naturally have been distressed, under his then situation amongst foreigners, for want of having ready money, or knowing how to procure it; and it might be even a kind and generous and commendable act to lend it to him at that time, to extricate him from his difficulties, as he was then circumstanced. The jury have left it quite open to the court to determine "whether anything, and what, is recoverable." As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is entitled to it, both by the law of England and by the law of France.

Interest will be payable upon this bill after the expiration of the ten days. The question will be, "How far the interest ought to be carried down." It is generally said, "to the day of the writ brought;" i. e. of commencing the action. But I do not see why it should not be carried further; it is equally reasonable, it is the right of the party, to have it to the last act of the court ascertaining the sum due.

I have long wished for an opportunity to have this point considered by the court; because I would not take it upon myself at *Nisi Prius*, to change what has commonly been the practice.

But, as to this last point, we will think of it for a day or two.

Mr. Justice DENISON gave no opinion now, on this last point. As to the rest, he said, it is a plain, clear, short case; it is determinable by the rules of the common law, and no other law.

The money is made payable in England. As it is a foreign bill of exchange, it must of course be dated abroad; but it is to be paid here at home. And the plaintiff has appealed to the laws of England by bringing his action here, and ought to be determined by them.

But, by the laws of England, the security is void; which might have been pleaded, as well as it might be given in evidence; and the defendant needed not, in his plea, to have said where it was won at play. And being a transitory action, it must then have been tried where the action was brought; and so it must have been, if the plea had been local. Indeed, in many cases that might be put, the determination

must have been according to the laws of the place where the fact arose. But the present case is not so; here, the security is void by the laws of the country where he brings his action upon it. And this security is one entire security both for the money won at play, and the money lent at play.

There is a distinction between the contract and the security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole.

Therefore the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country where he brings his action. But still the contract remains; and he has a right to maintain his action for so much of his demand as is legal, which is the money lent.

As to the time of carrying down the interest, it may be proper to consider of it a little while.

Mr. Justice WILMOT. Here are two sums demanded, which are blended together in one bill of exchange, but are divisible in their nature.

As to the money lent. The cases that have been cited are in point "that it is recoverable." But if there were none, yet I should be clear that the plaintiff may maintain an action for that.

As to contracts being good, and the security void: The contract may certainly be good, though the security be void; and I think that this contract is good, though the security is void, by the statute of 9 Anne. This is not stated to be money lent to play with, or for the purpose of play; but "lent at the time and place of play" only; nothing appears upon this case to induce any suspicion that it was lent for any bad purpose.

The statutes meant to prevent excessive gaming, and to vacate all securities whatsoever for money won at play; and the genuine, true, and sound construction of 9 Anne is to understand it as intended to prevent any securities being taken for money won at play, or lent to play with, when the borrower had lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* lent, though at the time and place of play.

As to the interest that shall be given to the plaintiff upon the sum lent, in the assessment of the damages: This is an action that sounds in damages; and the true measure undoubtedly is the damage which the plaintiff sustains by the non-performance of the contract; and that damage is the whole interest due upon the sum lent; viz. from the time of its being payable, up to the time of signing the judgment. Nay, even then he may suffer; he may still be kept out of his money, by writ of error, for a still further time. According to my memory, Lord Coke's exposition of the statute is, that the "costs of the writ" shall extend to all the legal costs of the suit.

The present case, notwithstanding the questions that have been agi-

tated in arguing it, comes out to be no case at all, no point at all, no law at all.

Indeed, "Whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted," is a great question (though I should have no great doubt about that). But that case does not exist here: for it is not here stated, "that such a debt as this, for money won at play in France, is recoverable in the ordinary courts of justice there," but quite the contrary. So that the laws of France and of England are the same as to the money won: the contract is void as to that, by the laws of both countries.

And as to this wild, illegal, fantastical court of honor, the court of the marshals of France, acting only *in personam*, contrary to the universal and general laws even of the country where the transaction happened, and contrary to the genius and spirit of our own law too; it would be absurd to suppose that the bare possible accidental chance of a recovery in that court should be a foundation for maintaining an action here, upon a matter prohibited by the laws of both countries.

Besides, Sir John Bland himself, as it seems, was not, and the present defendant, the person now before this court, could never have been the object of the jurisdiction of that court. The remedy there, in its utmost extent, was only *in personam*; and this defendant is an administratrix only.

A strong reason for the plaintiff's recovering in this action the money lent is, that the bill of exchange is payable in England; and therefore it shall be determined according to the laws of England, where it is payable. As in the case of *Sir John Champant v. Ld. Ranelagh*, Mich. 1700, in Chancery (reported in *Precedents in Chancery*, 128). A bond was made in England, and sent over to Ireland, and the money to be paid there; but it was not mentioned what interest should be paid: my Lord Keeper was of opinion, "that it should carry Irish interest." Therefore, as this money was payable in England, the law of England must be the rule of recovering it.

I give no opinion as to the other point: yet I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed.

There is no difference, in this case, between the statute law and the common law of England; a contract cannot be maintained upon the one that is void by the other.

The law of the place where the thing happens does not always prevail. In many countries, a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here, upon such a contract which arose in such a country: but that would never be allowed in this country. Therefore the *lex loci* cannot in all cases govern and direct.

The sentences of foreign courts have always some degree of regard paid to them by the courts of justice here; and it is very right that

an attention should be paid to them, as far as they ought to have weight in the case depending.

But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore, if this rule of determination was different, by the law of France, from our rule here, yet I should incline, that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other; because the party seeking redress has chosen to apply here. But I give no opinion at all on this point.

As to the money lent: There can be no doubt; because there is no law either in England or France that hinders the plaintiff from maintaining his action for it.

IN RE MISSOURI STEAMSHIP COMPANY.

CHANCERY DIVISION: COURT OF APPEAL. 1888 : 1889.

[*Reported 42 Chancery Division, 321.*]

CHITTY, J. This is a claim by Mr. Munroe against the Missouri Steamship Company, Limited, for damages for loss of his cattle. Mr. Munroe is a citizen of the United States domiciled there. The company is an English company incorporated according to English law, domiciled in England, and now in voluntary liquidation. The contracts were made at Boston, Massachusetts, where the company had an agent by whom the contracts were entered into on their part. The ship on which the goods were to be carried was the Missouri, a British ship, and one of a line of steamships trading regularly between Boston and Liverpool. The contracts were for the carriage of the cattle from Boston to Liverpool, and they contained express stipulations exempting the shipowners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The cattle were shipped on board at Boston, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purposes of the present case that the stranding occurred through the negligence of the master and crew. In these circumstances it is clear, as admitted by the claimant's counsel, that he is not entitled to recover if these stipulations, exempting the shipowners from liability arising from the negligence of their servants, are valid. But it is contended for the claimant that the stipulations are invalid according to the law

of the State of Massachusetts, where the contracts were in fact made and the bills of lading given and accepted.

There was no substantial contest before me as to the present state of the law in Massachusetts on the subject. According to that law the stipulations are invalid. The ground upon which the decision at present stands is that the stipulations by which a common carrier endeavors to exempt himself from the consequences of the negligence of himself and his servants are considered to be extorted by the carrier without any real assent on the part of the person sending the goods, and are void as being contrary to public policy. In the *Brentford City*, 29 Fed. Rep. 373, these principles were held to apply in favor of the shipper at Boston of cattle on board a British vessel for carriage to England, where the facts were substantially the same as those in the present case. The law in the United States on this subject, however, appears not to be finally settled. The question is apparently pending in the Supreme Court in the case of "*The Montana*" on appeal from the Circuit Court. The Supreme Court has given leave to the appellants to adduce evidence to show what is the English law on the subject. The arguments have been concluded and the judgment has been reserved. But as after inquiry I am unable to ascertain that some considerable time may not elapse before the judgment is given, and as it is not clear that the judgment will determine the point, I have not thought it right to postpone any longer my decision. Should the judgment of the Supreme Court be in favor of the shipowner on the validity of the stipulation, Mr. Munroe's claim must fail.

I proceed, then, to consider the question on the assumption that according to the law of Massachusetts the stipulations are void. The question to be determined is whether the law of England or the law of Massachusetts ought to be applied to the stipulations which purport to exempt the shipowners from liability for negligence.

For the claimant it is argued that the question, being a question as to the validity of the terms of the contracts, ought to be determined according to the law where the contracts were made. For the shipowners, on the other hand, it is argued that the question ought to be determined according to the law of the country to which the ship belongs. As the stipulations in the contracts and the bills of lading are identical there is no occasion to treat these documents separately.

Now the question does not relate to the formal validity of the contracts, and the question raised by the claimant does not go to the validity in matters of substance of the contract as a whole. So far as relates to all matters of form the contracts are valid according to the law of both countries. So far as relates to all matters of substance the rest of the contracts would, if the stipulations attached had not been inserted, stand valid according to the law of both countries. Further, the stipulations are not impeached on the ground that they are of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the law of civilized countries; they are im-

peached solely on the ground that they are void, as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own views of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although the law of Massachusetts would in the case of a contract made in Massachusetts by a common carrier for the carriage of goods wholly within the territories of the State hold these stipulations void, I cannot find any sufficient reason for saying it would hold them void in the case of a contract made within the State for the carriage of goods where the performance of the contract was (as in the case before me) to take place mainly outside the State, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of Massachusetts would not prohibit the parties to such a contract from contracting expressly with a view to the law of England. See Lord Mansfield's judgment in *Robinson v. Bland*, 2 Burr. 1078, and Story's *Conflict of Laws*, pp. 280, 281.

The contracts before me do not contain any such express declaration. But I have examined and endeavored to ascertain the precise nature of the objections raised, with this result, as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts.

Two cases of high authority were relied upon by the company's counsel in support of their contention: *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, and *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N.S.) 272. The actual decisions in those cases may not precisely govern the present case, but the question is whether the principle upon which those decisions are based does not apply.

It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention.

Numerous instances of the exceptions are to be found in the books. A different intention, that is an intention to be bound by some other law than the law of the place where the contract is made, may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract. See the judgment of Mr. Justice Willes in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, 123. The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn. The general principle by which the Court of Exchequer was guided in the solution of the question as to what law ought to prevail was that the rights of the parties to a contract are to be judged of by that law

by which they intended, or rather by which they may justly be presumed to have intended, to bind themselves, and by the steady application of that principle the court arrived at the conclusion that where the contract of affreightment does not provide otherwise than as between the parties to such contract in respect of sea-damage and its incidents, the law of the ship should govern. In that case the ship was a French ship, the contract was made at a Danish West-Indian port, and the goods were shipped to Hayti to be delivered at Havre, London, or Liverpool, at the charterer's option. The court held that the law of France applied, whereby the shipowners on abandonment of the ship and freight were exempt from any liability to the owner of the cargo, and rejected the law of Denmark and the various other countries put forward on behalf of the owners of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out; but in adopting the French law the court relied on the subject-matter of the contract, the employment of a sea-going vessel for a service the greater and more onerous part of which was to be rendered on the high seas, where for all purposes of jurisdiction, criminal and civil, with respect to all persons, things, and transactions on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which even when in a foreign port was never completely removed from French jurisdiction. These practical considerations formed the main ground of the judgment. The court declined to enter into any question as to the policy of the French law.

I have referred somewhat fully to this judgment in order to show that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable and ought to be applied not merely to questions of construction and the rights incidental to, or arising out of, the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinctions founded on the difference of these questions were not rested on substantial ground, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simple, natural, and consistent rule. Westlake's *Private International Law*, 2d ed. p. 201.

In *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, there were no express stipulations pointing to the law of the country rather than to the law of some other country, but in *Peninsular and Oriental Steam Navigation Company v. Shand*, 3 Moo. P. C. (N. S.) 272, where also it was held that the contract was governed by the law of the flag, there were such stipulations, and Lord Justice Turner, in delivering the judgment of the Privy Council, inquired into the actual intention of the contracting parties as disclosed on the face of the contract. In that case the

contract was made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The performance was to commence in an English vessel in an English port, to be continued in vessels which, for this purpose, carried their country with them, to be fully completed in Mauritius, but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of England, but invalid according to the law of Mauritius. In discussing the intention of the parties the Lord Justice asked, in substance, whether it was contended that the stipulation should be construed according to the English law, which would give effect to it, or according to the French law, or some other law, which would give no effect to it, and he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract, to be interpreted according to English law, and that there was no rule of general law or policy setting up a contrary presumption, and consequently that the court below was wrong in not governing itself according to those rules. Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in England, whereas in the present case one only of the parties is English, and the contract was made in Boston. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations.

In determining a question between contracting parties (to quote from the judgment in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 120), recourse must first be had to the language of the contract itself, and, force, fraud, and mistake apart, the true construction of the language of the contract is the touchstone of legal right. The circumstance that the stipulations which the claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country, affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed and not to the law which disallowed the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss occurred through the negligence of the shipowner's servants within the territorial waters, not of Massachusetts, but of Wales, that is, of a country where English law prevails. Conceding that it would be possible (without saying it would be reasonable) to presume that the parties contracted with reference to the law of Massachusetts in respect of any loss by negligence occurring within the territorial waters of that State, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that State in

respect of a loss by negligence occurring outside the limits of that State.

I hold, then, that the stipulations are valid, first, on the general ground that the contracts are governed by the law of the flag, and secondly, on the particular ground that from the special provisions of the contracts themselves it appears the parties were contracting with a view to the law of England.

From this judgment the claimant appealed.

The appeal came on to be heard on the 20th of June, 1888, but the hearing stood over to await the decision of the Montana Case in the Supreme Court of the United States.

The case came on again on the 1st of May, 1889, when a printed copy of the judgment in the Montana Case was produced to the court, from which it appeared that the stipulation in question was held by the Supreme Court to be void as being contrary to public policy.¹

Fry, L. J. The principles on which this case has to be decided have been familiar to the courts at any rate since the time of Lord Mansfield, who in the case of *Robinson v. Bland*, 2 Burr. 1077, expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 122, where the learned Judge, who delivered the judgment of the Exchequer Chamber, said: "It is, however, generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance," — and he goes on to enumerate instances from which the courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589, in this court.

I think, therefore, the general principle on which we have to proceed is one which admits of no doubt; and the inquiry, therefore, is this: looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation.

Now, in the first place, the ship was an English ship; the owners were an English company; England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of England, the contract would be good in the terms in which it stood; whereas according to the law of the United

¹ Arguments of counsel and the concurring opinions of Lord HALSBURY, L. C., and COTTON, L. J., are omitted. — ED.

States important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to show that what must be presumed to have been the intent of the parties was this : that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt that that is the conclusion which we ought to arrive at.

In coming to that conclusion, and in stating those principles, I am glad to find that I am in entire accordance with the law laid down in the American courts. It appears to me that the passages cited from Mr. Justice Story are strong in favor of the principle to which I have referred, and in the case of "*The Montana*" that rule was adopted in express terms by the Supreme Court of the United States. Lord Justice Cotton has read one passage from that judgment, and I will read another: "This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view;" and in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place where the contract was made to have been presumed by the parties. Therefore, it is obvious in adopting the principles which I have stated we are proceeding not only according to the English law, but also according to the law of America. It is very desirable, if possible, that the law relating to the interchange of comity between nations should be the same.

There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir Walter Phillimore laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the United States has in terms prohibited or has rendered illegal or criminal the introduction of this stipulation, it appears to me that the decision in the *Montana Case* shows that that is not the law of the United States. That decision, I think, when fairly read, shows what one would expect to be the case, namely, that the courts have held that this stipulation being obnoxious to their public policy is void, not illegal, exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and that the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation, then no other country will enforce that stipulation, we have a proposition which on

the face of it appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir Walter Phillimore adopts, neither of them will support his case.

I think, therefore, the decision of Mr. Justice Chitty was correct, and that this appeal fails.¹

PRITCHARD v. NORTON.

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 106 *United States*, 124.]

ERROR to the Circuit Court of the United States for the District of Louisiana. This action was brought by Eliza D. Pritchard, a citizen of Louisiana, executrix of Richard Pritchard, deceased, against Norton, a citizen of New York, upon a bond made in New York by said Norton and another, conditioned to indemnify Pritchard against loss arising from his liability on an appeal bond already given by them as principals and signed by Pritchard as surety in Louisiana. Pritchard was called upon to pay money upon the appeal bond. The defendant set up by way of defence, that the bond sued on was executed and delivered by him to Pritchard in the State of New York, and without any consideration therefor, and that by the laws of that State it was void, by reason thereof. The court so ruled; the plaintiff excepted to the ruling, and now assigns the exception as error.²

MATTHEWS, J. It is claimed on behalf of the plaintiff that by the law of Louisiana the pre-existing liability of Pritchard as surety for the railroad company would be a valid consideration to support the promise of indemnity, notwithstanding his liability had been incurred without any previous request from the defendant. This claim is not controverted, and is fully supported by the citations from the Civil Code of Louisiana of 1870, art. 1893-1960, and the decisions of the Supreme Court of that State. *Flood v. Thomas*, 5 Mart. n. s. (La.) 560; *N. O. Gas. Co. v. Paulding*, 12 Rob. (La.) 378; *N. O. & Carrollton Railroad Co. v. Chapman*, 8 La. Ann. 97; *Keane v. Goldsmith, Haber & Co.*, 12 La. Ann. 560. In the case last mentioned it is said that "the contract is, in its nature, one of personal warranty, recognized by articles 378 and 379 of the Code of Practice." And it was there held that a right of action upon the bond of indemnity accrued to the obligee, when his liability became fixed as surety by a final judgment, without payment on his part, it being the obligation of the defendants upon the bond of indemnity to pay the judgment rendered against him, or to furnish him the money with which to pay it.

¹ *Acc. South African Breweries v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273. — Ed.

² This statement of the case is substituted for that of the Reporter. Arguments of counsel and part of the opinion are omitted. — Ed.

The single question presented by the record, therefore, is whether the law of New York or that of Louisiana defines and fixes the rights and obligations of the parties. If the former applies, the judgment of the court below is correct; if the latter, it is erroneous.

The argument in support of the judgment is simple, and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because no other place of performance being either designated or necessarily implied, it was to be performed there; wherefore the law of New York, as the *lex loci contractus*, in both senses, being *lex loci celebrationis* and *lex loci solutionis*, must apply to determine not only the form of the contract, but also its validity.

On the other hand, the application of the law of Louisiana may be considered in two aspects: as the *lex fori*, the suit having been brought in a court exercising jurisdiction within its territory and administering its laws; and as the *lex loci solutionis*, the obligation of the bond of indemnity being to place the fund for payment in the hands of the surety, or to repay him the amount of his advance, in the place where he was bound to discharge his own liability.

It will be convenient to consider the applicability of the law of Louisiana, first, as the *lex fori*, and then as the *lex loci solutionis*.

1. The *lex fori*.

The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights precisely as should a tribunal of the State of Louisiana according to her laws; so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement; and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory.

This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do; but, in doing so, nevertheless adheres to its own system of formal judicial procedure and remedies. And thus the distinction is at once established between the law of the contract, which may be foreign, and the law of the procedure and remedy, which must be domestic and local. In respect to the latter the foreign law is rejected; but how and where to draw the line of precise classification it is not always easy to determine.

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract. . . .

The question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and belongs to the constitution of the contract. The difference between the law of Louisiana and that of New York, presented in this case, is radical, and gives rise to the inquiry, what, according to each, are the essential elements of a valid contract, determinable only by the law of its seat; and not that other, what remedy is provided by the law of the place where the suit has been brought to recover for the breach of its obligation.

On this point, what was said in *The Gaetano & Maria*, 7 P. D. 137, is pertinent. In that case the question was whether the English law, which was the law of the forum, or the Italian law, which was the law of the flag, should prevail, as to the validity of a hypothecation of the cargo by the master of a ship. It was claimed that because the matter to be proved was, whether there was a necessity which justified it, it thereby became a matter of procedure, as being a matter of evidence. Lord Justice Brett said: "Now, the manner of proving the facts is matter of evidence, and, to my mind, is matter of procedure, but the facts to be proved are not matters of procedure; they are matters with which the procedure has to deal."

It becomes necessary, therefore, to consider the applicability of the law of Louisiana as —

2. The *lex loci solutionis*.

The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, — "The principle that in every forum a contract is governed by the law with a view to which it was made." The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077, 1078. "The law of the place," he said, "can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." And in *Lloyd v. Guibert*, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather, by what general law it is just to presume that they have submitted themselves in the matter." *Le Breton v. Miles*, 8 Paige (N. Y.), 261.

It is upon this ground that the presumption rests, that the contract

is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention.

So, Phillimore says: "It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfilment, — whether that place be fixed by express words or by tacit implication — as the place to the jurisdiction of which the contracting parties elected to submit themselves." 4 Int. Law, 469.

The same author concludes his discussion of the particular topic as follows; "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted, either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements." 4 Int. Law, § 654, pp. 470, 471.

This rule, if universally applicable, which perhaps it is not, though founded on the maxim, *ut res magis valeat quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent.

It was expressly referred to as a decisive principle in *Bell v. Packard*, 69 Me. 105, although it cannot be regarded as the foundation of the judgment in that case. *Milliken v. Pratt*, 125 Mass. 374.

If now we examine the terms of the bond of indemnity, and the situation and relation of the parties, we shall find conclusive corroboration of the presumption, that the obligation was entered into in view of the laws of Louisiana.

The antecedent liability of Pritchard, as surety for the railroad company on the appeal bond, was confessedly contracted in that State, according to its laws, and it was there alone that it could be performed and discharged. Its undertaking was, that Pritchard should, in certain contingencies, satisfy a judgment of its courts. That could be done only within its territory and according to its laws. The condition of the obligation, which is the basis of this action, is, that McComb and Norton, the obligors, shall hold harmless and fully indemnify Pritchard against all loss or damage arising from his liability as surety on the appeal bond. A judgment was, in fact, rendered against him on it in Louisiana. There was but one way in which the obligors in the indemnity bond could perfectly satisfy its warranty. That was, the moment the judgment was rendered against Pritchard on the appeal bond, to come forward in his stead, and, by payment, to extinguish it. He was entitled to demand this before any payment by himself, and to

require that the fund should be forthcoming at the place where otherwise he could be required to pay it. Even if it should be thought that Pritchard was bound to pay the judgment recovered against himself, before his right of recourse accrued upon the bond of indemnity, nevertheless he was entitled to be reimbursed the amount of his advance at the same place where he had been required to make it. So that it is clear, beyond any doubt, that the obligation of the indemnity was to be fulfilled in Louisiana, and, consequently, is subject, in all matters affecting its construction and validity, to the law of that locality.

This construction is abundantly sustained by the authority of judicial decisions in similar cases.

In *Irvine v. Barrett*, 2 Grant's (Pa.) Cas. 73, it was decided that where a security is given in pursuance of a decree of a court of justice, it is to be construed according to the intention of the tribunal which directed its execution, and, in contemplation of law, is to be performed at the place where the court exercises its jurisdiction; and that a bond given in another State, as collateral to such an obligation, is controlled by the same law which controls the principal indebtedness. In the case of *Penobscot & Kennebec Railroad Co. v. Bartlett*, 12 Gray (Mass.), 244, the Supreme Judicial Court of Massachusetts decided that a contract made in that State to subscribe to shares in the capital stock of a railroad corporation established by the laws of another State, and having their road and treasury there, is a contract to be performed there, and is to be construed by the laws of that State. In *Lanusse v. Barker*, 3 Wheat. 110, 146, this court declared that "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place."

The case of *Cox v. United States*, 6 Pet. 172, was an action upon the official bond of a navy agent. The sureties contended that the United States were bound to divide their action, and take judgment against each surety only for his proportion of the sum due, according to the laws of Louisiana, considering it a contract made there, and to be governed in this respect by the law of that State. The court, however, said: "But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the Treasury Department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States

on such settlement; and such paying over must be to the Treasury Department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington, and the liability of the parties must be governed by the rules of the common law." This decision was repeated in *Duncan v. United States*, 7 Pet. 435.

These cases were relied on by the Supreme Court of New York in *Commonwealth of Kentucky v. Bassford*, 6 Hill (N. Y.), 526. That was an action upon a bond executed in New York conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell lottery tickets for the benefit of a college in that State. It was held that the stipulations of the bond were to be performed in Kentucky, and that, as it was valid by the laws of that State, the courts of New York would enforce it, notwithstanding it would be illegal in that State.

Boyle v. Zacharie, 6 Pet. 635, is a direct authority upon the point. There Zacharie and Turner were resident merchants at New Orleans, and Boyle at Baltimore. The latter sent his ship to New Orleans, consigned to Zacharie and Turner, where she arrived, and, having landed her cargo, the latter procured a freight for her to Liverpool. When she was ready to sail she was attached by process of law at the suit of certain creditors of Boyle, and Zacharie and Turner procured her release by becoming security for Boyle on the attachment. Upon information of the facts, Boyle promised to indemnify them for any loss they might sustain on that account. Judgment was rendered against them on the attachment bond, which they were compelled to pay, and to recover the amount so paid they brought suit in the Circuit Court for Maryland against Boyle upon his promise of indemnity. A judgment was rendered by confession in that cause, and a bill in equity was subsequently filed to enjoin further proceedings on it, in the course of which various questions arose, among them, whether the promise of indemnity was a Maryland or a Louisiana contract. Mr. Justice Story, delivering the opinion of the court, said: "Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made, and the payment, unless otherwise stipulated, would also be understood to be made there;" "that the contract would clearly refer for its execution to Louisiana."

The very point was also decided by this court in *Bell v. Bruen*, 1 How. 169. That was an action upon a guaranty written by the defendant in New York, addressed to the plaintiffs in London, who, at the latter place, had made advances of a credit to Thorn. The operative language of the guaranty was, "that you may consider this, as well as any and every other credit you may open in his favor, as being under my guaranty." The court said: "It was an engagement to be executed in England, and must be construed and have effect according to the laws of that country," citing *Bank of the United States v.*

Daniel, 12 Pet. 54. As the money was advanced in England, the guaranty required that it should be replaced there, and that is the precise nature of the obligation in the present case. Pritchard could only be indemnified against loss and damage on account of his liability on the appeal bond, by having funds placed in his hands in Louisiana wherewith to discharge it, or by being repaid there the amount of his advance. To the same effect is *Woodhull v. Wagner*, Baldw. 296.

We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfilment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York. For error in its rulings on this point, consequently, the judgment of the Circuit Court is reversed, with directions to grant a new trial.
*New trial ordered.*¹

CARNEGIE v. MORRISON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[Reported 2 Metcalf, 381.]

SHAW, C. J.² Action of assumpsit, brought by Carnegie & Co., a mercantile firm at Gottenburg, Sweden, against Messrs. Morrison, Cryder, & Co., of London. The action is founded upon a letter of credit given by the defendants, by Mr. Oliver, their general agent, residing in Boston, upon the application of Mr. John Bradford, in favor of the plaintiffs, and for the purpose of paying, in part, a large debt due from Bradford to the plaintiffs for merchandise before shipped to him on credit. The letter of credit is of the following tenor:

"BOSTON, 4 March, 1837.

"MESSRS. MORRISON, CRYDER, & Co., London: — Mr. John Bradford of this city having requested that a credit may be opened with you for his account in favor of Messrs. D. Carnegie & Co. of Gothenburg for three thousand pounds sterling, I have assured him that the same will be accorded by you on the usual terms and conditions.

"Respectfully your obt. serv't,

"FRANCIS J. OLIVER.

"For £3,000."

It appears by the evidence that Oliver was the general agent of the defendants in Boston; that this letter of credit was obtained upon the

¹ *Acc. Seiders v. Merchant's Life Assoc.*, 93 Tex. 194, 54 S. W. 753. Conversely it has been held that a contract valid at the place of making but void by the law of the place of performance is invalid. *Hawley v. Bibb*, 69 Ala. 52 (*semble*); *Thayer v. Elliott*, 16 N. H. 102. — ED.

² Part of the opinion only is given. — ED.

application of Bradford, and was immediately forwarded to the plaintiffs at Gottenburg; and that notice of it was given to the defendants at London. Mr. Oliver knew the purpose for which Bradford wanted it. He had often had similar letters of credit from Mr. Oliver before; all of which have been honored, except one other in favor of Scholfield & Co., which is now in controversy in this court. Mr. Bradford was accustomed to give satisfactory security, from time to time, to Mr. Oliver, and to pay the defendants a commission of one per cent. It also appears that upon the strength of this letter of credit, the plaintiffs drew a bill or bills on the defendants, according to the usual mode of drawing bills at Gottenburg on London, which the defendants declined accepting. Various other circumstances were given in evidence, but this is a summary of the leading facts in the case.

This action, if it can be maintained at all, as between these parties, must be maintained on the letter of credit. But a question meets us at the outset, what law shall determine the rights of the parties in this transaction? It is obvious that the undertaking of the defendants was to do some act out of this country. The substance of that undertaking was to give Bradford a credit for the use and benefit of Carnegie & Co.; in other words, the substance and effect of that undertaking was to pay a sum of money to Carnegie & Co. in discharge of Bradford's debt to them, by means of bills of exchange to be drawn by Carnegie & Co. on the defendants, in their own favor, or in favor of their appointee, for their use, in consideration of the promise of Bradford to provide funds to meet those bills, giving them satisfactory security, placed in the hands of their agent, and in further consideration of a commission of one per cent paid by Bradford.

In considering the nature of this transaction, the inquiry involves two questions: first, whether the transaction in question constitutes a contract, in which the plaintiffs have an interest; and, secondly, whether the interest of the plaintiffs in this contract is of such a character that they can maintain an action upon it in their own names. The question, therefore, does not depend exclusively upon the *lex fori*, although, as the action is brought in this Commonwealth, its laws must determine whatever relates to the remedy. Supposing that the *lex loci contractus* is also to have a bearing on the question, it must be considered that some of the rules applicable to the construction and effect of contracts are founded in positive law, established by usage or by statute, which each country will establish for itself, according to its own views of convenience and policy, and have a local operation; whilst others are derived from those great and unchangeable principles of duty and obligation which are everywhere recognized amongst mercantile communities, and indeed amongst all civilized nations, as lying at the foundation of civil contracts, and must be considered as having the same effect, wherever by the comity of nations contracts made in one country are allowed to be carried into effect by the laws of another. In some States, for instance, a bond made to one or his assigns is re-

garded as a negotiable instrument, and creates an obligation to pay to the obligee, or any person who shall legally become the assignee of it. In others, a note for money, payable to one or order, creates a legal obligation to the payee only, and an indorsee cannot maintain a suit in his own name. Whether an instrument, made in a particular form, shall have the one or the other construction, will depend upon the positive law of the country which governs it; and such law therefore will determine the nature and legal obligation of the contract created by it; it is positive law, concurring with, and giving effect to, the act of the parties, which determines the nature and extent of such contract. But that a party entering into a formal stipulation to pay money, or do some other beneficial act to or for another, shall substantially perform that undertaking, is a great principle of moral as well as legal obligation, and of international as well as municipal law, recognized everywhere.

Taking it as settled, in the present case, that the defendants became subject to a duty or obligation of some kind, the real subject of discussion is not merely as to the remedy, but whether the facts now in proof constituted a contract between these parties which may be enforced by an action.

The objection to such an action, and the ground of this defence, are that the immediate parties to the transaction were Bradford on the one side and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to, and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee, that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A. deposits money with B. to the use of C., the latter may have an action against B., though they are in fact strangers. But if C., not choosing to look to B. as his debtor, calls upon A. to pay him, notwithstanding such deposit (as he may), and A. pays him, A. shall have an action against B. to recover back the money deposited if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. *Hall v. Marston*, 17 Mass. 575. So in regard to a very common transaction; when one

deposits money in a bank to the credit of a third person, and forwards him a certificate, or other evidence of the fact, the bank is regarded as coming under an obligation to pay the money to the person to whose credit it is thus deposited. So it is held in England, when the depository assents to receive the money, though there is no consideration moving from the plaintiff to the defendant. *Lilly v. Hays*, 5 Adolph. & Ellis, 548. We think, therefore, it is no decisive objection to an action by the plaintiffs, that the act done constituted, at the same time, a contract between the defendants and Bradford, on which the latter might provisionally have had a remedy, in case the plaintiffs should not assent to, and enforce the contract, so far as it was intended for their benefit.

From this view of the case, it is manifest that the question whether a particular transaction constitutes a contract, and between whom, upon which one party can have a remedy against another by judicial proceedings, must depend upon the law governing such contract, as well as the law of the forum where it is sought to be enforced. The remedy may be sought in the form of an action at law, or a bill in equity, or before any special tribunal, according to the law of the place where it is sought. But the question whether a particular act or instrument constitutes a contract, and between what parties, is previous in its nature, and must generally be settled before any question of remedy arises.

What then is the law of the contract, or, in other words, what law determines whether an act done constitutes a contract, and if so, between whom and to what effect? The general rule certainly is, that the *lex loci contractus* determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation. There may, perhaps, be exceptions to this rule; as where parties happen to meet on a desolate island in a savage country, where the principles of commerce and civilization do not prevail, or where a settled municipal law is not enforced or regarded. Perhaps such would be the construction of a contract between American or European merchants in China, who rather reside on the confines of that empire than live under its government; and where they may be presumed to have reference, in their dealings, to the general laws and usages of the commercial world, without regard to the laws of the people with whom they temporarily reside. But a contract, made in one country, may contemplate the execution of deeds or other contracts, making payments, or doing other legal acts in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract; and the obligation of such contract will bind the contracting party to do all such legal acts according to the law of the place where they are to operate, so as to have their full legal effect. As if a person in one country should contract to convey land in another; the general rule being that the *lex loci rei sitæ* fur-

nishes the rule which regulates titles and conveyances of real estate, the true construction and legal effect of such contract would be that the conveyance should be executed in such form as effectually to transfer the title according to the law of the place where the land lies. If the land were in Massachusetts, where the law requires the execution and acknowledgment of a deed, it would bind the contracting party to execute and acknowledge such deed, though made in a country where, by its municipal law, a deed would not be necessary. If the stipulation be that the drawee shall accept a bill in a foreign country, and the law of that country require that a valid acceptance shall be in writing, though not required by the law of the place where drawn, it is a contract that the drawee shall accept the bill in writing.

That the transaction now in question constituted a good contract to some purpose, and between some parties; that it was made on a good, valuable, and adequate consideration, and made in Massachusetts, is not contested. Then the rule *prima facie* is, that the construction and legal effect of this transaction are to be determined by the law of Massachusetts. That is the law which must be regarded, in the first instance, in deciding whether the act done constituted a contract, and if so, between whom, and to what effect, and must prevail unless the case falls within some exception to the general rule; and the question is whether it does. It is true that the parties to this suit are both foreigners, one residing in Sweden and the other in England. This, however, is immaterial, and only respects the question who may sue and be sued in our courts. By the comity of nations, alien friends are allowed the benefit of our courts in seeking their civil rights as plaintiffs; and the defendants, by placing their property under the control and protection of our government, place themselves within the jurisdiction of our courts. But the immediate actors in the transactions were here. Bradford, the prime mover, who opened and conducted the negotiation, paid the consideration, and caused the obligation to be entered into, was a resident citizen of Massachusetts; and though in legal strictness he might not be considered as the agent of the plaintiffs before they had assented to and adopted his act, yet still he so far acted for them as to procure a stipulation, which, if executed, would inure to their benefit. The other party, though domiciled abroad, were here for the purpose of conducting mercantile and financial business by their regularly constituted resident agent. The money was paid, or the security given, in Boston, which constituted the consideration for the defendants' undertaking. The negotiation, which terminated in giving the letter of credit, was commenced and completed in Boston.

That some things are referred to foreign laws and usages, in this agreement, is manifest in the instrument itself. The words, "on the usual terms and conditions," are obviously of this character. They refer to the laws and usages both of Sweden and England. All parties, of course, knew that the credit was to be given by the defendants by means of bills of exchange, although this is not expressed in terms.

Supposing that the object was that this credit should be afforded by means of bills of exchange, to be drawn by Carnegie & Co. in Gottenburg, on Morrison & Co. in London, the instrument refers to the laws and usages of Sweden for the mode of drawing, and to those of England for the mode of acceptance; and the legal effect and obligation of the contract in Boston are that the parties will respectively conform to those laws and usages in the performance of their respective acts. But it is not as to the non-observance of any of these that the question arises. The gravamen of the complaint is that the defendants have violated the obligation of their contract in its entire substance. It becomes, therefore, necessary to inquire and ascertain more exactly what that contract, in its legal effect and operation, was. The substance of the undertaking of the defendants may, we think, be simplified and expressed thus: Whereas, John Bradford is indebted to Messrs. Carnegie & Co. of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London; we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.

The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed that, but for this transaction, Bradford would have adopted some other mode of remittance. Regarding it as a question of principle and not of technical law, it was an undertaking in which the plaintiffs had an interest nearly or quite as direct, and as great, as if the promise had been in terms to them, or the negotiation had been with them; or as if the instrument had been a promissory note, procured by Bradford to be made payable to them, in consideration of money paid and security given by him, and such note afterwards remitted to and received by them. Upon these facts, the court are of opinion that the construction, the obligation, the legal effect and operation of this transaction are to be governed by the law of Massachusetts. So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this State, giving force and effect to the undertaking of the defendants' agent, and mak-

ing it a contract binding on them. Supposing the law of England had provided that no letter of credit should be issued, unless under seal, or stamped, or attested by two witnesses, or acknowledged before a notary, is it not clear that, as no such formalities are required by our laws, a letter of credit made here would be held good without such formalities? We think it would be so held even in England, under the authority of the general rule, that a contract, valid and binding at the place where made, is binding everywhere. There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption that the parties looked to them as furnishing the rule of law which should govern this contract. It was, therefore, in our opinion, in legal effect, a contract made in Massachusetts by parties, both of whom were here by their agents, or persons acting for their benefit and in their behalf, and therefore the nature, obligation, and effect of this contract must be governed by the law of this Commonwealth.¹

KENNEDY v. COCHRANE.

SUPREME JUDICIAL COURT OF MAINE. 1876.

[*Reported 65 Maine, 594.*]

ASSUMPSIT, on account annexed.

The plaintiff was an innkeeper in St. Stephen's, New Brunswick, duly licensed, under the statute of that province, to sell liquor as a retail dealer; the liquor sued for was sold at retail by the plaintiff to the defendant, who then was, and is now, a resident of Calais, Maine; the liquor sold was not for re-sale, but was for the defendant's own use; the items of the account were charged by the plaintiff to the defendant, who has never paid the account nor any part of it; the items were all for glasses and pints of liquor, except the first item, which was to balance of old account \$2.01, which old account was for liquor.

Acts of New Brunswick, on the subject, make a part of the case.

If the action is maintainable, the defendant to be defaulted; otherwise, the plaintiff to be nonsuit.

APPLETON, C. J. This is an action of assumpsit for liquors sold the defendant by the plaintiff, a licensed innholder in St. Stephen's, New Brunswick. The sale was by the glass or pint, and charged at the time of delivery.

By an act of the general assembly of New Brunswick, passed in 1873, c. 10, § 16, it was enacted that "no innkeeper, or tavern keeper, who shall sell upon trust or credit, any liquors, mixed or unmixed, to any person, shall have any remedy against the said person, his executors or administrators, either in law or equity, for the recovery thereof; and if

¹ *Acc. Bradshaw v. Newman*, 1 Ill. 94; *Woodruff v. Hill*, 116 Mass. 310. — Ed.

any bill, bond, note, mortgage, or other security or conveyance shall be made and delivered, the consideration, or any part of the consideration of which, shall be proved to be for liquors sold, the same shall be taken to be fraudulent and void in all courts of justice," etc.; "and if any pawn or pledge shall be left, by any person, with any tavern or innkeeper, it shall be lawful for any justice of the peace of the county in which such pawn or pledge may have been left on complaint and proof of the same, to order the said pawn or pledge to be restored, and shall further convict the inn or tavern keeper who may have received the same, in a penalty not exceeding twenty dollars for each offence."

The tavern or innkeeper who sells on credit is without remedy. All securities given for such sales are declared fraudulent and void. All pawns or pledges left are to be restored, and the tavern or innkeeper receiving the same is liable in a penalty of twenty dollars for each offence.

The liquors, for which this suit is brought, were charged. They were not sold for cash. They were sold on trust or credit, and hence they were charged. If sold on trust or credit, the plaintiff is without remedy, by the law of New Brunswick, where the sales were made. Sales of liquors on trust or credit must be regarded as prohibited, when by the statute the seller is without remedy. The license to sell applies only to sales for cash. Such is the obvious intention of the statute.

The sales to the defendant were in palpable violation of the law of the place where they were made. The plaintiff could not recover in New Brunswick. Is his chance improved by a change of jurisdiction?

The general rule is, that contracts void by the law of the land where made are void everywhere else, and that what is a good defence in the place of contract is a valid one wherever the contract is attempted to be enforced. It is well settled by the principles of international comity, that the laws of every people in force within their own limits ought to have the same force as to contracts there made, everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens. It would be a queer illustration of the comity of nations to enforce in a foreign jurisdiction a contract void by the law of the place where it was entered into. Nor do we think there is to be found anything in our statutes or decisions which should particularly encourage an attempt to enforce a contract like the present in this jurisdiction.

Plaintiff nonsuit.

DICKERSON, DANFORTH, VIRGIN, PETERS, and LIBBEY, JJ., concurred.¹

¹ Acc. *Archer v. Ins. Co.*, 2 Bush, 226; *Bell v. James*, 6 Mart. n. s. 74; *Ivey v. Lalland*, 42 Miss. 444; *Bliss v. Brainard*, 41 N. H. 256; *Thatcher v. Morris*, 11 N. Y. 437 (cf. *Kentucky v. Bassford*, 6 Hill, 526); *Touro v. Cassin*, 1 N. & McC. 173. — Ed.

BLACKWELL v. WEBSTER.

CIRCUIT COURT OF THE UNITED STATES. 1886.

[Reported 23 Blatchford, 537.]

BENEDICT, J. The plaintiff's right to recover in this action depends upon the validity of an agreement made between him and the defendant Webster, whereby, in consideration of services to be performed by the plaintiff, as attorney, in prosecuting the defendant Webster's claim to a legacy of \$10,000, left a deceased daughter, by the last will and testament of her uncle, one Brady, one-third of the money that the defendant Webster might recover under said will, as heir at law of his daughter, was assigned to the plaintiff.

At the time of the making of this agreement the plaintiff was a resident of the State of New York, and the defendant Webster a resident of the State of Maine. The agreement was entered into in the State of Maine, and there it was reduced to writing and executed. At that time, as now, there was in force, in the State of Maine, a statute providing, that "any person agreeing to prosecute or defend a suit at law or equity upon shares, shall be punished by a fine not exceeding one thousand dollars, nor less than twenty dollars, or by imprisonment not more than one year;" and one of the questions presented for decision here, by the defendants, is, whether the effect of this statute of Maine is to render void the agreement upon which the plaintiff bases his right to recover.

In determining this question, it is to be observed, that the act made criminal by the statute of Maine is not the act of prosecuting a suit on shares, but the act of making an agreement to prosecute a suit on shares. It is also to be observed, that the statute is not confined to agreements respecting suits to be prosecuted in the courts of Maine, but includes all agreements to prosecute a suit on shares, without regard to the place where the suit is to be instituted. Its plain object is to prevent the making of agreements of the character described, within the State of Maine. It is also to be observed, respecting the agreement in question here, that it contains no language limiting its operation to the prosecution of suits outside of the State of Maine, but includes suits instituted in the State of Maine, as well as elsewhere. It is, however, true, that the circumstances attending the making of the agreement show that the object of the agreement was to procure the institution of a suit in New York, that a suit in Maine was not contemplated, and that all the services rendered by the plaintiff, in pursuance of the agreement, were performed in New York.

Upon the facts, the plaintiff, in opposition to the contention of the defendants, insists that his agreement was an agreement to be performed in New York, and, therefore, is to be judged according to the law of New York, and not according to the law of Maine. Upon this

question my opinion is, that the validity of the agreement in question is to be determined by the law of Maine, and that the effect of the statute of Maine, already referred to, is to render the agreement void. For the plaintiff, when he entered into the agreement in question, did an act made criminal by the law of the place where the act was done. The statute of Maine forbade the doing in the State of Maine precisely what the plaintiff did when he agreed to prosecute Webster's suit on shares. As soon as the agreement was made the plaintiff became liable to indictment in the courts of Maine for making the agreement, and to such an indictment it would have been no answer to say that he contemplated doing other acts in New York, in accordance with the agreement. A criminal act can never be the foundation of a lawful agreement. The agreement was void at its inception, because the making of such an agreement was made criminal by law. For this reason the agreement could not be enforced in a court in Maine, and, if not enforceable in Maine, is not enforceable elsewhere. Says the Supreme Court of the United States, in *Coppell v. Hall* (7 Wall. 559): "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." So, also, the Court of Appeals of New York, in *Hyde v. Goodnow*, 3 N. Y. 269, says: "Assuming that the contracts in question had been made in Ohio, and that, by the laws of that State, such contracts are declared void, the courts of this State would be bound also to declare them void, though by their terms they were to have been performed here, and though, if made here, they would have been valid contracts."

But the plaintiff contends that this contract was lawful because the place of performance was in New York. But it seems to me to be plain that, inasmuch as the act of making the agreement could not lawfully be done in Maine, the circumstance that other acts were intended to be done in New York in pursuance of the agreement, cannot render lawful the act that was done in Maine. In such a case as this, there is no room to apply the fiction of the law, that the place of performance of a contract is to be deemed the place of making it. Here the question of the illegality of the agreement arose before anything was done in New York, because of the character of the agreement, and not because of the character of acts intended to be performed in pursuance of the agreement.

The plaintiff, for what he did in performance of his agreement within the State of New York, could not be indicted in Maine, but for what he did in Maine he could be there indicted, and that act is the foundation of his claim to recover in this action. He is asking the law to enforce a claim founded on a violation of a law. It is upon this point that I base my decision, and I find nothing in any case cited, including *Pritchard v. Norton*, 106 U. S. 124, that should compel a different conclusion.

But it may be added, that it is far from clear that New York can be held to be the place of performance of the agreement in question. As executed in Maine, the agreement constituted a present assignment,

then and there made by Webster, of an interest in a claim then belonging to him, a citizen of Maine. The plaintiff was to be paid one-third of such sum as might be received by Webster by virtue of the will. A reception of the money by Webster, before any division with the plaintiff, was clearly contemplated, and there is nothing whatever to indicate that such division was to be made in New York. The situs of Webster's personal property is Maine, and what the agreement provided for is a division of a portion of his property. It seems difficult, therefore, to hold that New York was, by the agreement, made the place of performance. My decree, therefore, is, that the plaintiff cannot recover, and his action is accordingly dismissed.

Inasmuch as no appeal can be taken from my decree, I have delayed promulgating this opinion, in order to submit it to Mr. Justice Blatchford, when holding court in this district, and, having so submitted it, I am authorized by him to say that he concurs therein.¹

ARBUCKLE v. REAUME.

SUPREME COURT OF MICHIGAN. 1893.

[Reported 96 Michigan, 243.]

LONG, J.² This action was brought to recover upon two promissory notes, dated February 4, 1889, and executed and delivered to the plaintiffs' agent in this State, but payable at plaintiffs' office, at Toledo, Ohio. The defendant, Peter Donnelly, pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted.

It was admitted that, while the notes bore date as of Monday, they were in fact executed and delivered to the agent of the payees in this State on Sunday. The court below ruled that, though the notes were executed and delivered in this State on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. Stat., as the laws of Ohio, and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs. . . .

The court below was in error in holding that the notes could be

¹ *Contra*, Richardson v. Rowland, 40 Conn. 565. In that case, Foster, J., said: "The contract between these parties, however, was in regard to a suit pending in the State of New York; the property attached was there situate; the services to be performed were to be performed there; and the money to be recovered, if recovered at all, was there to be recovered. The contract in short was to be performed in the State of New York. The law of New York, therefore, must necessarily govern the contract. Commonwealth of Kentucky v. Bassford, 6 Hill, 526. It becomes quite unnecessary to decide what the law of Connecticut, or of other States, may be on the subject of champerty and maintenance." — Ed.

² Part of the opinion is omitted. — Ed.

enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the State.

It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; *Myers v. Meinrath*, 8 Amer. Rep. 371.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.¹

BAXTER NATIONAL BANK v. TALBOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 *Massachusetts*, 213.]

MORTON, J. The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes, and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, to its own order, were indorsed in blank by it and the defendant, and by two other parties, and were all made payable at the "Baxter National Bank, Rutland, Vt.," which we assume to be the plaintiff bank. This suit is against the defendant alone. The defendant in his answer alleged that his indorsement was made and took effect as a contract in the State of Vermont, and that by the law of that State his obligation depended, as between the plaintiff and himself, or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself at the time when each indorsement was made in regard to said indorsement. The defendant further alleged that his indorsement was in fact made subject to an oral agreement with the plaintiff, which the defendant has fully performed, that "he was not to be liable thereon except to the amount of any moneys which he might receive upon a certain mortgage upon property in the State of New York." At the trial, the defendant offered testimony tending to prove these allegations. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori* and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial, and could not be considered by the jury. The defendant excepted to this ruling, and the question before us is as to its correctness.

¹ Acc. *Swann v. Swann*, 21 Fed. 299; *McKee v. Jones*, 67 Miss. 405, 7 So. 348. — ED.

The testimony introduced by the defendant tended to show the following, among other facts, in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff bank held overdue notes which it had discounted for the Esperanza Marble Company of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by the defendant. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection, and requested the defendant to attend to it in its behalf; and it was orally agreed between the defendant and the plaintiff that the mortgage should be assigned to the defendant, and that he should collect the same and pay over the proceeds to the bank. It was also orally agreed that the notes held by the bank against the Marble Company should be surrendered to it and new notes given by it therefor, which should be indorsed by the defendant and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the defendant to the plaintiff bank. It was further orally agreed that the defendant should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The overdue notes of the Marble Company were surrendered to it, and new notes, indorsed by the defendant and the other parties, were taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable at the plaintiff bank in Rutland, and the defendant's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the defendant, and he has paid over to the plaintiff bank all the money which he has collected under it.

The jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that the defendant's indorsement was made and took effect as a contract in that State.

It is apparent that, if the *lex fori* is to govern, the defendant cannot avail himself of the oral agreement entered into between the plaintiff and himself. *Adams v. Wilson*, 12 Met. 138; *Wright v. Morse*, 9 Gray, 337. We do not think, however, that it should govern. It is clear that in all that relates to a contract, to its nature and validity and interpretation, the law of the place where it is made governs. *Carnegie v. Morrison*, 2 Met. 381; *Milliken v. Pratt*, 125 Mass. 374; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Nichols v. Mase*, 94 N. Y. 160; *Buzzell v. Cummings*, 61 Vt. 213; *Forepaugh v. Delaware, Lackawanna, &*

Western Railroad, 128 Penn. St. 217; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 453. The law of the place where the contract is made is, without any express assent or agreement of the parties, incorporated into and forms a part of the contract. Contracts are presumed to be made with reference to the law of the place where they are entered into, unless it appears that they were entered into with reference to the law of some other State or country. *Central Bank of Washington v. Hume*, 128 U. S. 195, 207; *Chapin v. Dobson*, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. *Parsons v. Trask*, 7 Gray, 473; *Milliken v. Pratt*, 125 Mass. 374; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

On the other hand, it is equally clear that, in all that relates to the procedure for enforcing a contract, the law of the forum controls. *Carnegie v. Morrison*, 2 Met. 381; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563. Thus the form in which and the parties by or against whom the action shall be brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause or action is barred by the statutes of limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or as a simple contract, with many other similar things, have been held to be matters affecting the remedy, and therefore to be governed by the law of the forum. *Pearsall v. Dwight*, 2 Mass. 84; *Orr v. Amory*, 11 Mass. 25; *McClees v. Burt*, 5 Met. 198; *Foss v. Nutting*, 14 Gray, 484; *Richardson v. New York Central Railroad*, 98 Mass. 85; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304; *Leach v. Greene*, 116 Mass. 534; *Drake v. Rice*, 130 Mass. 410; *Downer v. Chesebrough*, 36 Conn. 39; *Leroux v. Brown*, 12 C. B. 801; *Stoneman v. Erie Railway*, 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract or to the remedy upon it. We think in the present instance it relates to the former, and not to the latter. The defendant contended that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended, as between the parties, upon the oral agreement or understanding between them, if any, at the time when he placed his name upon the notes. The defendant further contended that, when he placed his name upon the notes, he did so under an oral agreement with the plaintiff bank, by the terms of which his indorsement was only to be regarded as security for the payment by him to the bank of the money that he might collect on the mortgage which was assigned to him.

Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the defendant, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the bank. The defendant could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because, under the law of Vermont, the indorsement did not of itself constitute an absolute contract; but, in order to determine what the contract was, it was necessary to ascertain what agreements or undertakings were entered into at the time, and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and the defendant was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish, had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy. Back of the question of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that. See *Powers v. Lynch*, 3 Mass. 77; *Williams v. Wade*, 1 Met. 82; *Shoe & Leather National Bank v. Wood*, 142 Mass. 563; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Jemino*, 2 Strange, 733; *Wattson v. Campbell*, 38 N. Y. 153; *Dunn v. Welsh*, 62 Ga. 241; *Forepaugh v. Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides, an issue could at any time have been framed, in the discretion of the court, if satisfied that justice required that it should be done, or the court could hear and pass upon the question itself. *Atlanta Mills v. Mason*, 120 Mass. 244.

Exceptions sustained.

MILLARD v. BRAYTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 178 Massachusetts, 000.]

HAMMOND, J.¹ In 1868 the Mutual Life Insurance Company of New York issued a policy upon the life of Shubael W. Brayton, then a resident of North Adams, in this State, in the sum of \$10,000, "for the sole use of his wife," Sarah W. Brayton, the money to be paid to her if living at the death of her husband, "and, if not living, to her chil-

¹ Part of the opinion only is given. — Ed.

dren, or her guardian for their use." She died in 1877, leaving her husband and three children, surviving. Of these children, William, never having married, died in 1881, a minor. Harriott died in 1888, leaving a husband, but no children, surviving. Isabelle, in 1876, married the plaintiff, and in 1894 died, leaving him, but no children, surviving. Samuel W. Brayton died in 1897, leaving the defendant, his second wife, surviving, and she is his executrix and sole legatee. In 1890, by an agreement between Mr. Brayton and the company, the policy was "continued as and for a paid-up policy" for \$6,217, no further premiums to be required, "except in cases where an extra premium would be chargeable," and after his death the insurance money was paid to the defendant, the plaintiff joining in a release to the company. In this action the plaintiff, as the administrator of the estate of the daughter Isabelle, seeks to recover one third of this money.

The first question is whether the rights of the parties to this action are to be determined by the law of New York or of this State. At the time of the application and thereafter, Mr. Brayton and his wife were continually residents of this State. The application was made in this State, to the duly authorized agent of the company in this State, who forwarded the same to the home office, in the city of New York, where it was accepted, and the policy was sent by the company to its agent in this State, and by him here delivered. It does not appear that any notice was given of the acceptance until the policy was delivered in this State. In the application the beneficiary was the wife alone, while in the policy as sent by the company she was not the only beneficiary. The policy was not to be delivered until the premium was paid. The contract was not made until the policy as changed was delivered to Mr. Brayton, and the premium paid. The case is clearly distinguishable from *Commonwealth Ins. Co. v. Knabe & Co. Mfg. Co.*, 171 Mass. 265, upon which the plaintiff relies. The contract was made in this State, and the rights of the parties, so far as involved in this suit, must be settled by the law of this State, notwithstanding the stipulation in the policy that the premiums and the sum insured were to be paid in the State of New York. *Thwing v. Insurance Co.*, 111 Mass. 109; *Markey v. Insurance Co.*, 126 Mass. 158; *Society v. Clements*, 140 U. S. 226. See also *Insurance Co. v. Phinney*, 178 U. S. 327; *Hamlyn v. Talisker Distillery*, [1894] App. Cas. 202; *Jacobs v. Credit Lyonnais*, 12 Q. B. Div. 589; *Insurance Co. v. Cohen*, 179 U. S. 262.

ANDREWS v. POND.

SUPREME COURT OF THE UNITED STATES. 1839.

[Reported 13 Peters, 65.]

TANEY, C. J.¹ This case comes before the court upon a writ of error, directed to the judges of the Circuit Court for the Ninth Circuit and Southern District of Alabama.

The action was brought by the plaintiff as indorsee, against the defendants as indorsers of a bill of exchange in the following words:—

“NEW YORK, March 11, 1837.

“Exchange for \$7287.⁷⁸/₁₀₀.

“Sixty days after date of this first of exchange, second of same tenour and date unpaid, pay to Messrs. Pond, Converse, and Wadsworth, or order, seven thousand two hundred and eighty-seven ⁷⁸/₁₀₀ dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

“Your obedient servant

“To Messrs. Sayre, Converse & Co., }
Mobile, Alabama.” }

“D. CARPENTER.”

The case, as presented by the record, appears to be this. The defendants were merchants, residing in Mobile, in the State of Alabama. H. M. Andrews & Co. were merchants residing in New York; and before the above-mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co. as indorsers upon a former bill for \$6,000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last-mentioned bill was dated at New York, and fell due on the 21st of February, 1837, and was protested for non-payment.

The defendant Pond, it seems, was in New York in the month of March, 1837, shortly after this protest; when H. M. Andrews & Co. threatened to sue him on the protested bill: and the defendant Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent damages on the protested bill, and ten per cent interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement, an account, which is given in the record, was stated between them on the 11th of March, 1837, in which the defendants were charged with the protested bill and ten per cent damages on the protest, and interest and expenses, which amounted altogether to the sum of \$6,625.25, and ten per cent upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of \$7,287.78; for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which

¹ Part of the opinion only is given. — Ed.

this suit is brought, indorsed by the defendants in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for non-acceptance; and after this refusal and protest it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception, that after this transfer it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten per cent charged for the protested bill of \$6,000; nor as to the interest and expenses charged in the account herein before mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of Assembly of New York, and the interest and expenses, were properly charged in the account. The sum of \$6,625.25 was therefore due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of \$662.53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to \$7,287.78. The defendants allege that the ten per cent charged as exchange was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co. as the price of their forbearance for the sixty days given to the defendants. This was their defence in the Circuit Court, where a verdict was found for the defendants under the directions given by the court.

Many points appear to have been raised at this trial, which are stated as follows, in the exception taken by the plaintiff.

The defendant offered evidence, —

1. To prove that the said bill of exchange was usurious, according to the statute and laws of the State of New York. The plaintiff objected to the reading of the statute and depositions aforesaid, because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury or not by the laws and statutes of Alabama; and that the contract was subject only to the laws of the State of Alabama, as to its obligatory force and validity; and he further objected, that if this contract were to be decided by the statute of New York, that this proof could not be given under this issue; but the court overruled all these objections, and permitted the depositions and statute to be read, to show the bill of exchange to be void by the laws of New York: to all which plaintiff excepts. . . .

Plaintiff moved the court to charge the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury; and that the usury laws of New York had no force, or anything to do with this investigation. This was refused by the court, and plaintiff excepts. . . .

Upon the whole case, and the several points stated, the court charged

the jury that . . . if they believed from the evidence that the drawers of the bill of exchange contracted with the drawee in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum, for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious; and unless they believe from the evidence that the plaintiff took the bill in the regular course of business, and upon a fair and valuable consideration *bona fide* paid by him, and without notice of the usury, they ought to find for the defendants, otherwise for the plaintiff. . . .

Another question presented by the exception, and much discussed here, is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent, and in Alabama eight; and this small difference of one per cent per annum upon a forbearance of sixty days could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon a usurious consideration, the plaintiff would not be entitled to recover, unless he was a *bona fide* holder, without notice, and had given for it a valuable consideration; while by the laws of Alabama he would be entitled to recover the principal amount of the debt, without any interest.

The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile, in sixty days, with eight per cent interest, such a contract would undoubtedly have been valid, and would have been no violation of the laws of New York, although the lawful interest in that State is only seven per cent. And if in the account adjusted at the time this bill of exchange was given it had appeared that Alabama interest of eight per cent was taken for the forbearance of sixty days given by the contract, and the transaction was in other respects free from usury, such a reservation of interest would have been valid and obligatory upon the defendants, and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide.

The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine.

In the case of *De Wolfe v. Johnson*, 10 Wheat. 383, this court held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another State. And the case of *Dewar v. Shaw*, 3 T. R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it, that is to say, the damages on the protest of the first bill, were given by a law of that State, and the debt was then bearing the New York interest of seven per cent, as appears by the account before referred to. And, if in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case another question arose in the trial in the Circuit Court. By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration and without notice of the usury. The present plaintiff claims the benefit of this provision; but upon the evidence in the case it is very clear that he does not bring himself within it. The bill of exchange was protested for non-acceptance while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill at the time it was transferred to the plaintiff. Now, a person who takes a bill, which

upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment; and this is the rule in the English courts, as appears by the case of *Crossley v. Ham*, 13 East, 498. Now it is evident that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and indorsers. The bill was made and indorsed by the defendants for the purpose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception, and that taint must continue upon it in the hands of the present plaintiff.¹

BROWN v. NEVITT.

HIGH COURT OF ERRORS AND APPEALS, MISSISSIPPI. 1854.

[Reported 27 Mississippi, 801.]

HANDY, J.² This was a bill filed in the Southern District Chancery Court by James Brown, appellant, against John B. Nevitt, to foreclose a mortgage of real and personal property, executed by Nevitt to

¹ By the prevailing doctrine, where a contract is made in one jurisdiction to pay money in another, and the contract is usurious by the law of one jurisdiction and good by that of the other, the parties are said to be permitted to choose the one or the other law to govern their obligation, provided they do so *bona fide*; and they are presumed to have chosen that law which sustains the contract. *Junction R. R. v. Ashland Bank*, 12 Wall. 226; *Andruss v. People's B. & L. Assoc.*, 94 Fed. 575; *Dyert v. Vermont L. & T. Co.*, 94 Fed. 913; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 173 (cf. *Smith v. Muncie Nat. Bank*, 29 Ind. 158); *Brown v. Freeland*, 34 Miss. 181; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757; *Townsend v. Riley*, 46 N. H. 300; *U. S. S. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Thornton v. Dean*, 19 S. C. 583; *Sharp v. Davis*, 7 Baxt. 607; *Fisher v. Otis*, 3 Chand. 83. If, however, the place of performance is not *bona fide* agreed upon, but is named as a means of evading the usury laws of the place of contracting, the contract is usurious. *Nat. Mut. B. & L. Assoc. v. Burch* (Mich.), 82 N. W. 837; *Meroney v. Atlanta N. B. & L. Assoc.*, 112 N. C. 842, 17 S. E. 637. See *McAllister v. Smith*, 17 Ill. 328.

In some jurisdictions, however, greater stress is laid on the law of the place of performance; and a contract good by the law of the place of contracting but void by that of the place of performance is held invalid, unless the parties are shown to have intended otherwise. *Jackson v. Amer. Mtg. Co.*, 88 Ga. 756, 15 S. E. 812; *Odum v. N. E. Mtg. Sec. Co.*, 91 Ga. 505, 18 S. E. 131; *Underwood v. Amer. Mtg. Co.*, 97 Ga. 238, 24 S. E. 847; *Dickinson v. Edwards*, 77 N. Y. 578. (See *Sheldon v. Haxtun*, 91 N. Y. 124). — ED.

² Part of the opinion only is given. — ED.

Brown, to secure a debt amounting to \$32,500, and interest, consisting of several notes made by Nevitt to Brown, one for the sum of \$4,833.33½, two for the sum of \$10,833.33½ each, all bearing interest at the rate of eight per centum per annum from their date, also two drafts drawn by Nevitt on Samuel Nicholson, agent for Brown, amounting to the sum of \$6,000, all bearing the same date of the mortgage, and being payable at future days. The bill states that the first note and the two drafts had been paid, and claims that there was due on the two notes for \$10,833.33½, a balance of principal and interest of about \$23,879.60, and seeks a foreclosure.

The answer of Nevitt denies his indebtedness to the amount claimed in the bill, and alleges that the contract sought to be enforced against him is usurious, unlawful, and against the form of the statute in such case made and provided, and was made under the following circumstances: That Nevitt agreed with Nicholson, agent of Brown, that Brown should lend and advance to him the sum of \$32,500, on a credit of one, two, and three years, in equal annual instalments, to be secured by mortgage and to bear interest at the rate of eight per cent per annum from the date of the transaction; that \$10,000 of this amount was to be advanced by Brown, by causing a credit for that sum to be entered for Nevitt on the books of the Planters' Bank at Natchez, and the sum of \$16,500 of the money advanced was to be by a credit to that amount to be entered for Nevitt on the books of the Commercial Bank of Rodney; and the residue of said amount, \$6,000, was to be advanced in cash to Nevitt on the 1st of January thereafter; that the credits were accordingly given on the books of the banks, and the sum of \$6,000 was paid in cash, but that although the credits received on the books of the banks were at their nominal amounts, they were, at the time they were received, at a depreciation of twenty or twenty-five per cent. below lawful money; that the notes and mortgage were executed for the credits so given, in part as for a loan and advance of so much money by Brown to Nevitt, and with the intention to require a greater rate of interest than was allowed by our laws. . . . It is insisted in behalf of the appellant, that as these notes were made payable in Louisiana, they are to be governed by the law of that State; and as it is not shown that the contract was usurious by the law of that State, that it cannot be held to be usurious under our laws. This argument would have much force if the objection to this transaction was merely that a rate of interest not permitted by our laws, but allowable by the laws of Louisiana, was claimed or charged *bona fide*, and not with the view of evading our laws upon the subject; for in such a case, the law of the place of performance of the contract would govern it. But a much more serious objection is raised to this contract. The usury is alleged to consist, not in the stipulation for a rate of interest upon a legal loan not allowed by our laws, though legal in the State of Louisiana, but in loaning or selling depreciated bank securities as if they were worth their nominal value, by means of which an illegal rate of interest and a usurious

profit upon the real value loaned or sold would be realized. The objection is, that the consideration of the contract is illegal, because the appellant thereby reserved, as a component part of the principal sum intended to be secured, a usurious rate of interest upon the sum advanced, this being inherent in the transaction, and necessarily governed by the laws of this State, where it was actually done. Such a transaction is held to be prohibited by our laws, as is above shown; and it cannot stand on the same principles with a *bona fide* agreement made in one place, to be executed in another. We cannot recognize the laws of Louisiana as rendering valid a contract made here and sought to be enforced here, which is prohibited by our laws. The rule in such cases is, that the agreement must stand or fall by the law of the place where it was made. *Andrews v. Pond et al.*, 13 Pet. 65; *Story, Conf. Laws*, 208.

Here the defendant alleges that a usurious interest and profit were intended to be secured to the appellant, by means of the advance of bank credits to the amount of \$26,500, as at par, when they were at a depreciation of from twenty to thirty per cent, retaining upon the nominal amount interest at the rate of eight per cent per annum from the date. And these allegations are sustained by the evidence. It is shown that the appellant's agent, who conducted the negotiation, was well aware of the depreciation of the bank funds, and of Nevitt's great desire to procure them; that he would not transfer the sterling bonds, which were somewhat more valuable than the general bank credits, and were the kind of funds which he knew that Nevitt especially desired to purchase, and that he insisted that the bank credits should be received by Nevitt at par; that all the efforts of Nevitt to obtain the funds and advances on better terms were unavailing; that he had to come to Nicholson's terms, take a smaller advance of acceptances than he desired, take the bank debt at par, and pay interest at the rate of eight per cent upon the whole amount. These circumstances show that by the giving time of payment on the notes of Nevitt, an interest and profit were intended to be secured, contrary to the law of this State, and which cannot be carried into execution by our courts.

AKERS v. DEMOND.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.

[Reported 103 *Massachusetts*, 318.]

WELLS, J.¹ The defence to this suit is, that the bills of exchange are void for usury, under the laws of New York, where they were first negotiated. The statute of New York, Rev. Stat. part 2, c. 4, tit. 3, § 5,

¹ Part of the opinion only is given. — Ed.

declares such securities void "whereupon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken," a greater rate of interest than seven per cent. The Superior Court ruled that, upon the testimony offered, no defence was established, and instructed the jury to return a verdict for the plaintiffs. . . .

The testimony . . . tends to prove that the bills in suit were drawn by Reed and indorsed by William H. Russell, the payee, in New York, and accepted by the defendant in Boston, being upon their face addressed to him there. Both the acceptance and the indorsement were for the accommodation of Reed. The possession of collateral security, whether subsequent or at the time, does not change the character of the acceptance or the relations of the parties. *Dowe v. Schutt*, 2 Denio, 621. After the return of the acceptances to Reed, by an arrangement between him and the nominal payee, the latter procured the bills to be discounted by the plaintiffs, at the rate of one and a half per cent a month. The proceeds of one of the bills were retained by William H. Russell, the payee, as a loan from Reed, and the proceeds of the other handed over by him to Reed.

As the case is now presented, in the absence of controlling testimony on the part of the plaintiffs, the foregoing statement must be taken as the result of the evidence. It shows that the transaction by which the plaintiffs became holders of the bills was the original negotiation of the paper; a loan upon discount, and not a mere sale of the bills. They are therefore open to the defence of usury. This is so clearly shown to be the law of New York, by the decisions of the courts of that State referred to in *Ayer v. Tilden*, 15 Gray, 178, as to require no further citations.

The defendant is entitled to set up the usury, although not paid by himself, and although the loan was not made to him nor on his account. *Van Schaack v. Stafford*, 12 Pick. 565; *Duncomb v. Bunker*, 2 Met. 8; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312.

The difficult question in the case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the laws of the place where the bills are made payable. The general principle is, that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the State where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. In a suit upon a contract founded on such a loan, the penalty for usury could not be set up in defence, under the statutes formerly in force in this Commonwealth. Neither can a penalty, as a partial defence, authorized by the laws of one State, be applied or made effective in the courts of another State.

Gale v. Eastman, 7 Met. 14. Such penal laws can be administered only in the State where they exist. But when a usurious or other illegal consideration is declared by the laws of any State to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and everywhere. They never acquire a legal existence. Contracts founded on usurious transactions in the State of New York are of this character. *Van Schaack v. Stafford*, 12 Pick. 565; *Dunscomb v. Bunker*, 2 Met. 8. The fact that the bills now in suit were accepted in Boston and were payable there does not exempt them from this operation of the laws of New York. They were mere "nude pacts," with no legal validity or force as contracts, until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That then was the legal inception of the alleged contracts. *Little v. Rogers*, 1 Met. 108; *Cook v. Litchfield*, 5 Seld. 279; *Clark v. Sisson*, 22 N. Y. 312; *Aeby v. Rapelye*, 1 Hill, 1. By the statutes of New York, that transaction was incapable of furnishing a legal consideration; and, so far as the bills depend upon that, they are absolutely void. The original validity of such a contract must be determined by the law of the State in which it is first negotiated or delivered as a contract. *Hanrick v. Andrews*, 9 Port. 9; *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298; *Lee v. Selleck*, 33 N. Y. 615.

There is no pretence that a discount of one and a half per cent a month was justifiable by reason of any added exchange between New York and Boston; nor that it was otherwise than usurious, if any amount of charge upon paper payable elsewhere than in New York would be usurious there. It has often been held, in States where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with intent to evade the statutes relating to usury, and not in good faith as the legitimate proceeds of the contract, it is held to be usury. So also, if a greater rate is taken than is allowed by the law of either State, it is usury. Such a rate necessarily implies an intent to disregard the statutes restricting interest. *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298. The legal rate of interest or discount in Massachusetts is six per cent per annum; and, at the date of the negotiation of these bills, a greater rate than six per cent was usurious and unlawful.

It follows, from these considerations, that, upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as, under the laws of New York, renders them utterly void. No action, therefore, can be main-

tained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled. The verdict for the plaintiff must be set aside, and a *New trial granted.*¹

SCOTT v. PERLEE.

SUPREME COURT OF OHIO. 1883.

[Reported 39 Ohio State, 63.]

DOYLE, J. The findings and judgment of the court, where a case is tried without the intervention of a jury, will not be disturbed by this court, unless such findings and judgment are clearly against the weight of the evidence. In the present case, the testimony, beyond what appears upon the face of the note, consists solely of that given by the two parties, Scott and Perlee. Which of them was to be believed, was a matter properly to be determined by the court trying the case, and if the judgment can fairly be sustained upon the testimony of either, it ought not to be reversed. *Landis v. Kelly*, 27 Ohio St. 571.

The court might well find from this testimony, if the plaintiff was believed, that in the summer of 1870, the plaintiff was in Fairbury, Illinois, where the defendant, Andrew J. Scott, resided; that the latter, desiring money to carry on some building enterprises in which he was engaged, in Illinois, applied to the plaintiff, who was his brother-in-law and visiting him at the time, for a loan, agreeing to pay him therefor ten per cent interest; that the plaintiff agreed to make the loan upon the terms named, upon defendant's note, with Henderson W. Scott, who lived in Ohio, as surety, and that without any further arrangement Scott wrote the note at Fairbury, at which place he dated and signed it; that it was then sent to Ohio to the surety, who signed it and delivered it to the payee, receiving the money in this State and forwarding it to the principal, and that the parties intended in good faith, to contract with reference to the law of Illinois, as to the rate of interest to be paid for the use of the money.

The question presented for our consideration therefore is, whether such a contract, thus made, is usurious? That this contract was executed in Ohio may be conceded; although signed in Illinois by the principal debtor and there dated, it was delivered in Ohio and was not a completed contract until delivery. The fact that the loan was negotiated

¹ In several jurisdictions a note invalid for usury where made is void, without regard to the law of the place of payment. *Falls v. Savings Co.*, 97 Ala. 417; *Astor v. Price*, 7 Mart. N. S. 408; *Atwater v. Walker*, 16 N. J. Eq. 42; *Maynard v. Hall*, 92 Wis. 565, 66 N. W. 715.

In most jurisdictions a contract good where made will not be affected by the usury laws of the place of payment. *Sturdivant v. Bank*, 60 Fed. 730; *Amer. Freehold M. Co. v. Sewell*, 92 Ala. 163; *Pine v. Smith*, 11 Gray, 38; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713. — ED.

for in Illinois in accordance with the written terms of the note, is not insignificant, however, in determining the intention of the parties to contract with reference to Illinois law. *Findlay v. Hall*, 12 Ohio St. 612. It is then, the case of a citizen of Illinois executing his note in Ohio, in pursuance of an arrangement previously made in Illinois, for money borrowed to be used in the latter State, with an agreement to pay interest according to her laws, not intending or attempting thereby to evade our usury laws, but in good faith. Is such a contract tainted with usury?

Since the cases of *Findlay v. Hall*, 12 Ohio St. 610, and *Kilgore v. Dempsey*, 25 Ohio St. 413, it is undoubtedly the law of this State, and indeed it is now well established almost universally, that where a contract is entered into in one State, to be performed in another, between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided. Where such a contract, in express terms, provides for a rate of interest lawful in one but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest, in fact usurious. *Fisher v. Otis*, 3 Chandler, 102; *Butters v. Old*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 198; *Newman v. Kershaw*, 10 Wis. 340; *Horsford v. Nichols*, 1 Paige, Ch. 225; *Townsend v. Riley*, 46 N. H. 300; *Depau v. Humphreys*, 20 Mart. (La.) 1; *Fanning v. Consequa*, 17 Johns. 511; *Pratt v. Adams*, 7 Paige, 615; *Chapman v. Robertson*, 6 Paige, 627; *Richards v. Globe Bank*, 12 Wis. 696.

If the parties to the note in question had expressly stipulated in the note that it was payable in Illinois, the contract to pay ten per cent interest would be perfectly valid, although the note was executed in Ohio. Is it rendered invalid by reason of the omission to make that express stipulation? It is not entirely settled by the authorities where this note, as a matter of interpretation, is payable, there being no place expressly stipulated; but the weight of authority and the sounder reason, we think, sustain the proposition, that a note dated and signed at the place of residence of the debtor, and containing stipulations, lawful under the laws of such place, but forbidden by the law of the residence of the creditor, or where the note was completed by delivery and no other place of payment is named, will be presumed to be payable at the former place, assuming of course that no attempted evasion of the usury law of the latter is proved. In other words, in the absence of any proof the presumption of law is that the note in question is an Illinois contract, and is valid both as to principal and interest. To overcome this presumption the actual facts may be shown. It is shown that the contract was delivered in Ohio; but, taken in connection with the other facts proved, that does not overcome the presumption that it

is payable in Illinois, where the debtor resides, where he dated and signed his contract, and where alone it is legal according to all of its terms. 2 Parsons on Contracts, 584, and cases cited; Daniels' Neg. Inst. § 90; Arnold v. Potter, 22 Iowa, 198; Tillottson v. Tillottson, 34 Conn. 336; Jewell v. Wright, 30 N. Y. 264. Where such express stipulation would uphold the contract, if the same thing can fairly be inferred from what is stipulated, it will likewise be upheld.

But, while we believe that this contract can be thus sustained, it is not necessary to place the decision upon that ground. There is no reason why a citizen of Illinois, or any other State, may not come into Ohio and borrow money to be used in the State of his residence, and in good faith contract with reference to the laws of the latter State, independently of where his note is executed or where it is legally presumed to be payable. In such case the only question is one of good faith. Did he honestly contract with reference to the law of his allegiance, the law of the State or country where he lives?

In Arnold v. Potter, 22 Iowa, 194, the note was made by a citizen of Iowa, in Massachusetts, payable in New York, and the court instructed the jury that "If defendant went to Boston and urged the loan and promised ten per cent under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa, in good faith, then the defence fails and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence, but the understanding of the parties must prevail." The Supreme Court in affirming this charge say: "The form of the transaction is nothing, the cardinal inquiry being when the contract specifying the amount reserved is express, did the parties resort to it as a means of disguising the usury in violation of the laws of the State where the contract was made or to be executed, and in arriving at this intention all of the facts are to be taken into consideration."

It is true that in this case, like Chapman v. Robertson, *supra*, security was given by mortgage upon lands in the State of the debtor's residence, but the fact that security is given for a note does not alter the terms of the note. But such fact has significance in determining what the intention of the parties was, as to the laws of which State their contract had reference, or by which it was to be construed. Newman v. Kershaw, 10 Wis. 341; Fisher v. Otis, 3 Chandler, 83; Horsford v. Nichols, 1 Paige, Ch. 225; 2 Kent, Com. 12 ed. 460, bottom p. 623. It is a fact of no greater significance than is found in this case, where the borrower actually negotiated for the loan in the State of his residence, dated his note there, and stipulated for interest allowed by her laws. See Horsford v. Nichols, *supra*; 10 Wis. 340.

In a recent case, Kellogg v. Miller, 13 Fed. Rep. 198, decided by McCrary, C. J., in the Circuit Court of Nebraska, he held, upon a state of facts very like those recited in this case, except that there was a

mortgage security, that the contract was valid upon both grounds assumed in this opinion, first, because the contract was to be performed in Nebraska, and second, the ground we are now considering, "A citizen of one State may loan money to a citizen of another State, and contract for the rate of interest allowed by the laws of the latter State, although the legal rate of interest allowed is greater in such State than in the State where the contract is made, and in which it is to be performed." See also *Tilden v. Blair*, 21 Wall. 241, and comments thereon of Folger, J., in 77 N. Y. 580, that the ruling consideration of that case was the intention of the parties, that the draft should be used in Illinois, as a contract of that State, although accepted and payable in New York. *Wayne Co. Savings Bk. v. Low*, 6 Abb. N. C. 76, 95, *aff'd* 81 N. Y. 569; 2 Kent, Com. 12 ed., bottom p. 622-625, and note; *Vliet v. Camp*, 13 Wis. 208. Indeed these cases are but applications of the rule as given by Lord Mansfield. "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." *Robinson v. Bland*, 2 Burr. 1078. The place of making the contract is not to be so exclusively regarded, but that when the contracting parties had reference to another place that may be regarded; that is, the intention of the parties shall govern when it is made manifest. *Fisher v. Otis*, *supra*. That the parties here entered into this contract in good faith with reference to the laws of Illinois, there can be no doubt. The law of Ohio never entered into the transaction so far as the intention of the parties can be ascertained. There was no intention to make an illegal contract; and to hold it illegal, we must be able to say that the mere fact that Scott forwarded this note to his surety for his signature, and that it was signed and delivered by the surety in Ohio, and the money there paid (more than probably as a mere matter of convenience), has the effect of defeating the intention of the parties. It is difficult to perceive upon what principle we should so find.

We do not in thus holding encourage two citizens of Ohio to attempt to contract here for money to be used here, and make their notes payable in another State; nor in any way relax the strictness of the rules which prevent any form of evasion of the law against usury; but we hold that it is not repugnant to such law for a person to contract with reference to the law of his domicile, for money to be used there, where no such evasion is sought or intended.

*Judgment affirmed.*¹

¹ *Acc. Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024. *Contra*, *Amer. Freehold L. & M. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464 (*sensu*); *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141. — Ed.

BIGELOW v. BURNHAM.

SUPREME COURT OF IOWA. 1891.

[Reported 83 Iowa, 120.]

BECK, C. J. The promissory note is in the following language:

“STORM LAKE, BUENA VISTA CO., IOWA.

“For value received I promise to pay Rufus Burnham or bearer eighteen hundred and fifty-eight dollars and sixty-three cents, within one year from date, with interest at seven per cent. May 2, 1885.

“ROLLIN BURNHAM.”

The answer of the defendant admits the execution of the note in suit, but alleges that it was executed and delivered in the State of New York, and that under the laws of that State it is usurious and void. The statutes of New York declare that all notes and other contracts, providing for the payment of interest at a rate greater than six per centum per annum, shall be void. The evidence shows that the note in suit was signed in New York, and delivered there, and that the plaintiff at the time, and both prior and subsequently thereto, resided, and still does reside, in Storm Lake, in this State, and the payee of the note resided in New York. It is not shown where the indebtedness was incurred for which the note was given, nor where the consideration therefor was delivered to and received by the plaintiff, nor was there any evidence showing an agreement for the payment of the note at any specified place. The only facts upon which the case was decided are that the note was executed in New York, and that the payee resided in that State.

It is a settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity. *Butters v. Olds*, 11 Iowa, 1; *Arnold v. Potter*, 22 Iowa, 194; *Burrows v. Styker*, 47 Iowa, 477; *Story on Conflict of Laws*, §§ 242, 280, 281; *Andrews v. Pond*, 13 Pet. 65; 2 *Parsons on Notes and Bills*, 320.

The date and place of execution of a promissory note, which appear on its face, and not by mere memorandum entered thereon, raise the presumption that it is payable at that place. The reason of this rule is based upon the fact that the mention of the place is always intended to show that the note was executed there, just as the entry of the date is intended to show the day of execution. In business affairs, and the general affairs of life, the date of an instrument, and the place named in connection with the date, are written thereon, in order to show the day and place of its execution. The law will raise a presumption in accord with this uniform custom of men generally. The place named in a promissory note as the place of execution is usually the place of

residence or business of the maker of the paper, and is embodied in the note to show where it may be presented for payment. It follows that the law raises a presumption upon the face of the note of an agreement that it is payable at the place indicated as the place of its execution, and permits it to be enforced under the law prevailing there. 1 Parsons on Notes and Bills (1 ed.), 441, 442; Bullard v. Thompson, 35 Tex. 313; Orcutt v. Hough, 54 N. H. 472; Ricketts v. Pendleton, 14 Md. 320.

It will not do to presume that the parties entered into a contract, which is void under the laws of New York, and that they intended that it should be subject thereto. Such presumption would charge them with the folly or the fraud of entering, with their eyes open, into a void contract. Men are not presumed by the law to act in folly or in dishonesty, but rather that they intended in good faith that their acts shall be valid, and what they purport to be. Nor will we by presumption bring the case under the usury law of New York, which is penal in its effects. Bullard v. Thompson, 35 Tex. 313; Thompson v. Powles, 2 Sim. 194.

When a contract is made in one State, to be performed in another, and in express terms provides for a rate of interest lawful in one, but unlawful in the other State, the parties will be presumed to contract with reference to the laws of the State wherein the stipulated rate of interest is lawful, and such presumption will prevail until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious. If it be a *bona fide* transaction the contract will be sustained; if a device for securing usurious interest it will be held invalid. Scott v. Perlee, 39 Ohio St. 63; Newman v. Kershaw, 10 Wis. 333; Fisher v. Otis, 3 Chand. (Wis.) 83; Richards v. Bank, 12 Wis. 692; Horsford v. Nichols, 1 Paige, 220; Pratt v. Adams, 7 Paige, 615; Fanning v. Consequa, 17 Johns. 511; Townsend v. Riley, 46 N. H. 300; Arnold v. Potter, 22 Iowa, 194; Butters v. Olds, 11 Iowa, 1. See note to Martin v. Johnson, 8 Lawyer's Rep. Ann. 170; 10 S. E. Rep. 1092.

It appears that the rule as to the law of contracts, made in one State to be performed in another, is modified or softened when applied to contracts for interest, so that the intentions of the parties are effectuated, as a concession to trade and commerce. See Daniels on Negotiable Instruments, § 922, and cases cited; 2 Parsons on Contracts, § 5, p. 94, and cases cited. Hart v. Wills, 52 Iowa, 56, is not in conflict with our conclusions in this case, the note in that case being held to be an Iowa contract upon grounds not inconsistent with our decision in this case.

On the ground that the note upon its face will be presumed to be payable in Iowa, and in accord with other doctrines stated, we reach the conclusion that the judgment of the District Court ought to be

Reversed.

FOWLER v. EQUITABLE TRUST COMPANY.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 141 *United States*, 384.]

By deed, bearing date November 1, 1873, and acknowledged and filed for record February 23, 1874, Edwin S. Fowler—his wife, Sophie Fowler, uniting with him—conveyed to Jonathan Edwards, in fee simple, certain real estate in the city of Springfield, Illinois, in trust to secure the payment of the principal and interest of nine bonds, of one thousand dollars each, executed by Fowler to the Equitable Trust Company, a Connecticut corporation, and payable, principal and interest, at its office in the city of New York; the principal, five years after date, and the interest, semi-annually, at the rate of seven per cent per annum. . . .

The present suit was brought, October 26, 1882, to foreclose the defendants' right and equity of redemption, and for a sale of the mortgaged property to raise such sum as might be due the mortgagee.

Fowler, by his answer, put the plaintiff upon proof of the averments of the bill, and made defence upon several grounds. But the original answer is important only as alleging that the loan was usurious, and was consummated in the manner it was with intent to evade the statutes of Illinois relating to interest.

The plaintiff filed a general replication; and subsequently the defendants, by leave of the court, amended their answer, stating more fully the grounds upon which they based the defence of usury. They also alleged that the contract of loan was and is a New York contract, and that by the statutes of that State it was usurious, in that the interest contracted to be received by the plaintiff, having regard to the amount actually advanced by it, was in excess of seven per cent per annum, the rate established by the laws of New York. Of those statutes they claimed the benefit.¹ . . .

By the final decree of January 11, 1887, the sum of \$8,150.79 was adjudged to be due the Trust Company, of which \$7,809.69 was found to be the sum actually advanced by it to Fowler, and \$341.10 was the amount of insurance and taxes on the property paid by the company, with interest on each sum, from the date of the decree, at the rate of six per cent per annum. The mortgaged property was ordered to be sold to raise the above aggregate amount found to be due, with such interest and the costs of the suit. From that decree each party has prosecuted an appeal; the defendants insisting that no decree, for any amount, should have gone against them, while the plaintiff insists that the decree should have been for a larger amount.

¹ Only so much of the case as deals with this point is given. Arguments of counsel are omitted. — Ed.

HARLAN, J. The appellants Fowler and wife also contend that the contract of loan was a New York contract, and void under the laws of that State; and that neither the debt thus created, nor the mortgage given to secure the bonds, can be recognized, nor any recovery thereon had, in Illinois or elsewhere, for principal or interest. This contention rests upon the statute of New York, in force when the debt was created, providing that all bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action, than at the rate of seven per cent per annum shall be void. 1 Rev. Stats. N. Y. part 2, c. 4, title 3, § 5; vol. 2, 6th ed. (Banks & Brothers) 1164-6. The suggestion that by the contract of loan a rate of interest was reserved in excess of that allowed by the laws of New York, is based upon the ground that, although the bonds in suit call only for seven per cent interest, a much larger rate was, in fact, exacted and secured by the company, taking into consideration the amount of the loan, and the sum actually received under the contract.

By the thirteenth section of a statute of Illinois, in force on and after February 12, 1857, entitled "An act to amend the interest laws of this State," it was provided: "Where any contract or loan shall be made in this State, or between citizens of this State and any other State or country, bearing interest at any rate which was or shall be lawful according to any law of the State of Illinois, it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or territory of the United States, or in the city of London, England; and in all such cases such contract or loan shall be deemed and considered as governed by the laws of the State of Illinois, and shall not be affected by the laws of the State or country where the same shall be made payable." Gross's Stats. Illinois, 1869, 371, c. 54, § 13.

And by another act, in force on and after February 16, 1857, entitled "An act for the encouragement and security of loans of money," it was provided: "§ 14. It shall be lawful for any person or corporation borrowing money in this State, to make notes, bonds, bills, drafts, acceptances, mortgages, or other securities for the payment of principal or interest, at the rates authorized by the laws of this State, payable at any place where the parties may agree; although the legal rate of interest in such place may be less than in this State; and such notes, bonds, bills, drafts, acceptances, mortgages, or other securities shall not be regarded or held to be usurious; nor shall any securities taken for the same, or upon such loans, be invalidated in consequence of the rate of interest of the State, kingdom, or country where the paper is made payable being less than in this State, nor of any usury or penal law therein. § 15. No plea of usury nor defence founded upon an allegation of usury shall be sustained in any court in this State, nor

shall any security be held invalid on an allegation of usury where the rate of interest reserved, discounted, or taken does not exceed that allowed by the laws of this State, in consequence of such security being payable in a State, kingdom, or country where such rate of interest is not allowed. § 16. It shall be lawful for all parties loaning money in this State, to take, reserve, or discount interest upon any note, bond, bill, draft, acceptance, or other commercial paper, mortgage, or other security, at any rate authorized by the laws of this State, whether such paper or securities for principal or interest be payable in this State, or in any other State, kingdom, or country, without regard to the laws of any other State, kingdom, or country; and all such notes, bonds, bills, drafts, acceptances, or other commercial paper, mortgages, or other security, shall be held valid in this State, whether the parties to the same reside in this State or elsewhere." Gross's Stats. Illinois, 1869, 372, c. 54.

These statutory provisions were in force at the time of the contract of loan involved in this case. And although the above acts of February 12, 1857, and February 16, 1857, were repealed by the act approved March 31, 1874, in force July 1, 1874, they remained in full force and effect as to rights acquired or causes of action existing under them, and before the repealing act went into operation. Rev. Stats. Illinois, 1874, pp. 1012, 1023, 1046, c. 131, § 5, paragraphs 297, and 299, and § 6. And by the act approved March 25, 1874, in force, July 1, 1874, entitled, "An act to revise the law in relation to the rate of interest," this provision of former acts was re-enacted and preserved: "When any bond, bill, draft, acceptance, mortgage, or other contract shall have been or shall be made in this State, or between citizens of this State, or a citizen of this State and any other State, territory, or country, bearing interest at a rate lawful by the laws of this State, may be made payable in any other State, territory, or country, such contracts shall be governed by the laws of this State." Rev. Stats. Illinois, 1874, 615, c. 74, § 8.

The contract of loan in question having been made between a citizen of Illinois and a corporation of another State, and the bonds having been executed in Illinois and secured by mortgage upon real estate there situated, the defence of usury, in a court of the United States, sitting in and administering the laws of Illinois, cannot be sustained upon the ground simply that the rate of interest, exacted or reserved, was in excess of that allowed by the law of the State in which the bonds are made payable. . . .

WAYNE COUNTY SAVINGS BANK v. LOW.

COURT OF APPEALS, NEW YORK. 1880.

[Reported 81 *New York*, 566.]

RAPALLO, J. In *Dickinson v. Edwards* (77 N. Y. 573), the decision in *Jewell v. Wright* (30 N. Y. 259) was adhered to, and it was held that where a promissory note was made in this State by a resident thereof, bearing date and, by its terms, payable in this State, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another State at a rate lawful there, but greater than that allowed by law in this State, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this State.

That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair* (21 Wall. 241) expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors, who were residents of New York, yet after having accepted in New York they returned the acceptance to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that State. And this court says, in its opinion in *Dickinson v. Edwards* (77 N. Y. 573), that that was the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright*, and in the case then before the court, there was nothing to show an intent on the part of the maker of the note to give authority to deal with it otherwise than as the law of this State would allow.

The case of *Bank of Georgia v. Lewin* (45 Barb. 340) and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this State, and that in the absence of such proof it must be governed by the law of the place of payment.

In the present case, the fact which was wanting in *Jewell v. Wright* and *Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiff, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania, in the form in use in that State, by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then

mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent per annum, which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by the plaintiff in New York was simply in execution of that agreement, and, as is said in *Dickinson v. Edwards* (p. 580) in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance, for the convenience of the maker, and not an essential part of the contract, or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another State, and there makes an agreement with a citizen of that State for the loan or forbearance of money, lawful by the laws of that State, can render his obligation void by making it payable in another State according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the State where the contract was made, is signed in another State and sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed. The counsel for the appellant disputes the fact that the agreement for the giving of the note in suit in renewal of the \$2,000 note, which fell due, was made in Pennsylvania, but the findings and evidence clearly show that it was. The proposition for the renewal was made by the defendant at Honesdale, in writing, and there received by the plaintiff. In this proposition the defendant requested plaintiff's cashier to send defendant a new note to be signed, which the cashier did. The making of the new note by the cashier and forwarding it to the defendant for execution constituted a clear and definite acceptance of the proposition, and made the agreement to renew complete. The sending of the note and check by defendant signed were an execution of this completed agreement. He says he sent the check under a previous agreement. The appellant seeks on this appeal to set up a defence to the note in suit on the ground that the original \$10,000 note was an accommodation note, and was discounted in violation of the agreement under which it was loaned, and that the plaintiff did not give full value for it, \$2,000 of the proceeds of the discount having been applied to the payment of a precedent debt of the indorser. It is sufficient to say that the alleged facts on which this defence is based are not found by the referee, nor requested to be found, but that, on the contrary, the referee found that the \$10,000 note was discounted by the plaintiff for value in the ordinary course of business, and no exception was taken to this finding.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ *Acc. Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638. In *Sands v. Smith*, 1 Neb. 108, it was held that a note made in Nebraska, and valid according to Nebraska law, was nevertheless usurious, according to the law of New York, since the agreement for the loan was made and the note was payable in New York. — Ed.

GALE v. EASTMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[Reported 7 Metcalf, 14.]

ASSUMPSIT by the payee against the maker of a promissory note made and payable in New Hampshire. The defence was usury.¹

SHAW, C. J. By the law of New Hampshire, the contract, even though usury were taken or received upon it, was not void; it was so far legal, that an action might be maintained and a judgment recovered upon it, with certain deductions. Act of 12th Feb., 1791. By § 2, it is provided that when usury is relied upon, in defence, a special mode of trial may be offered by the defendant; that is, a trial by oath of the parties, as formerly practised under the law of Massachusetts, St. 1788, c. 55, but which mode of proof and form of trial are now altered in this State. By the law of New Hampshire, still in force, if the usury is thus proved, a certain amount shall be deducted, in assessing the damages, from the principal and interest due on the note. These provisions apply only to the remedy, and of course can extend only to suits brought in New Hampshire, and can have no effect when a remedy is sought under our laws. The general rule is, that those provisions of law which determine the construction, operation, and effect of a contract are part of the contract, and follow it, and give effect to it, wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract.

The law of Massachusetts, though somewhat analogous, cannot apply, because, although the mode of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this Commonwealth declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought on such contracts, that is, contracts made in violation of its own provisions.

*Judgment for the plaintiff.*²

¹ This short statement is substituted for that of the Reporter. Arguments of counsel are omitted. — Ed.

² Acc. *Sherman v. Gassett*, 9 Ill. 521; *Lindsay v. Hill*, 66 Me. 212; *Collins Iron Co. v. Burkam*, 10 Mich. 283; *Watriss v. Pierce*, 32 N. H. 560. See *Meares v. Finlayson*, 55 S. C. 105, 32 S. E. 986. — Ed.

SECTION IV.

INTERPRETATION.

MULLEN v. REED.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1894.

[Reported 64 Connecticut, 240.]

TORRANCE, J.¹ In July, 1891, Joseph Mullen, domiciled in the town of Stafford in this State, died intestate, leaving the plaintiff as his widow, and one minor child. The plaintiff and the deceased intermarried prior to 1877, and said child is the issue of the marriage.

At the time of his death, Joseph Mullen was a member of "The Bay State Beneficiary Association" of Westfield, Massachusetts, a corporation organized under the laws of that State, "for the purpose of providing Benefit and Protection to its members and their families." He became a member thereof in 1882, while domiciled in the State of Massachusetts, where he and his family continued to reside for some years afterwards. By the certificate of membership issued to him by said association, he was constituted a member thereof; and in said certificate the association agreed "to pay to the 'heirs-at-law' of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

Within sixty days after his death, said association paid to the defendant Reed, as the guardian of said minor child, the sum of five thousand dollars in full of the amount due under said certificate, and he now holds the same as such guardian. The present action was brought by the plaintiff, the widow of Joseph Mullen, against said guardian to recover a portion of said insurance money.

The defendant Reed demurred to the complaint because it did not appear therein "that the plaintiff is an heir-at-law of the said Joseph Mullen or that she is entitled to any part of said insurance money."

The court overruled the demurrer, and subsequently, after the administrator of Joseph Mullen had been cited in as a party, and "after a full hearing" no answer having been filed in the case, rendered judgment that the widow recover of the defendant Reed one third of the insurance money together with costs of suit.

From that judgment Reed, as guardian of the child, took the present appeal, alleging as reasons of appeal, that the court erred in overruling the demurrer, and in deciding that the plaintiff was entitled to one third of the money. It does not appear that the administrator makes

¹ Part of the opinion only is given. — Ed.

any claim to the insurance money or any part thereof, or that he took any part in this suit. There is really but one question before us upon this appeal, and that is whether the widow is entitled to one third of the insurance money.

By a written agreement signed by the counsel for both parties, filed in the court below after the present appeal was taken, and printed with the record, the plaintiff attempts to bring up the question whether the widow is or is not entitled to one-half rather than one-third of the insurance money, if she is entitled to any; but this agreement is no part of the record in any proper sense, and it nowhere appears upon the record, as required by the statute (§ 1135) that this question was raised on the trial below and decided adversely to the plaintiff. That question is therefore not properly before us, and for this reason we decline to consider it.

The question, then, is whether the widow is entitled to one third of the insurance money; and its solution depends upon the construction of the words "heirs-at-law" contained in the certificate of membership under which the money was paid over to the guardian of the minor child.

What do these words "heirs-at-law" mean in this certificate? Do they include or exclude the widow? Under these words the guardian claims the entire sum for the minor child, and the widow claims a share of it under the same words.

The question of course is, what was intended by these words at the time they were put into this certificate; and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that State alone; and that both by its terms and by the understanding of the parties it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that State. *Smith v. Mead*, 3 Conn. 253; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Koster v. Merritt*, 32 Conn. 246. "For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances." *Staigg v. Atkinson*, 144 Mass. 564. This principle is, we think, equally applicable to an instrument like this certificate.

We therefore think the words "heirs-at-law" in this instrument ought to be construed by us as they would be by the courts of Massachusetts, if this certificate was before them for construction upon this point; and as we understand the matter, the courts of that State, in cases where the words "heirs-at-law" are used in an instrument disposing of personal property alone, have quite uniformly construed them as meaning those persons who are entitled to take under the statute of distributions, unless there is something in the context to indicate a con-

trary intention. *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *White v. Stanfield*, 146 Mass. 424; *Kendall v. Gleason*, 152 Mass. 457. And not only this, but the courts of that State have held that the words "heirs-at-law," when used in such an instrument, indicated an intent that such persons are to take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. . . .

The result thus reached is also, we think, in accordance with the actual intent of Joseph Mullen, so far as the same can be ascertained from the certificate read in the light of the circumstances under which it was made, as they appear of record, and without reference to the rule we have been considering. The certificate is in the nature of a contract of insurance. The money to become due on it, under the laws of Massachusetts, Supp. to the Pub. Stat., p. 811, § 15, as appears of record, could not be taken by creditors, and it is fair to presume that this was known to the deceased at the time the certificate was issued. If so, there would be the further presumption that he thus intended to create a fund for the benefit of his family primarily, and not for the benefit of his creditors, or his estate; a fund that would go to the members of that family living at the time of his death, not as a part of his estate, but directly by force of the certificate.

He designated the class who were to take as beneficiaries, by the words "heirs-at-law;" and it is a fair presumption that he used those words for this purpose, in view of the uniform meaning which had been given to them in instruments of a nature similar to this certificate, by the courts of Massachusetts. In short, from the certificate itself, read in the light of the circumstances under which it was made, we think it is fair to conclude that Joseph Mullen used the words "heirs-at-law" in their popular sense, as meaning those persons who would take his intestate personal property under the statute of distributions of the State of Massachusetts, and that under them, consequently, he meant to include his widow.

The money due upon the certificate at the time of his death formed no part of his estate, but belonged to the beneficiaries. It nowhere appears that the deceased had the power to substitute other beneficiaries in place of the class first designated; and if he had, it is quite certain that he never exercised it. This certificate, then, was in effect a valid agreement, on the part of the association, to pay the money to become due under its provisions, to the beneficiaries designated therein. When due, the money certainly belonged to them and not to the estate of the deceased. *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60; *Masonic Aid Asso. v. Jones*, 154 Pa. St. 99.

There is no error apparent upon the record.

In this opinion the other judges concurred.¹

¹ *Acc. Codman v. Krell*, 152 Mass. 214, 25 N. E. 90. But see *Price v. Tally*, 10 Ala. 946. — Ed.

KNIGHTS TEMPLARS AND MASONIC MUTUAL AID
ASSOCIATION *v.* GREENE.

CIRCUIT COURT OF THE UNITED STATES, S. D. OHIO. 1897.

[*Reported 79 Federal Reporter, 461.*]

PETITION in the nature of an interpleader filed by the plaintiff association against the widow, mother, and brothers and sisters of John G. Greene, filed in the Superior Court of Cincinnati, and removed to this court. The petition was filed to determine who among the defendants should be paid the amount of an insurance policy issued by the plaintiff association in 1879 on the life of John G. Greene for the sum of \$5,000. He died in 1894. The plaintiff association was an Ohio corporation; one of its agents went to New York, where Greene then was and always remained domiciled, and secured from him an application for the policy; the policy was mailed from Ohio, probably to the company's agent in New York, and was delivered to Greene. At the time of Greene's death the policy was payable "to the heirs of the said John G. Greene."¹

TAFT, Circuit Judge.² It is contended on behalf of the widow of John G. Greene, the insured, that the word "heirs" should be construed according to the laws of Ohio. If so, it is conceded that, as the insured left no children, she would take the entire fund, whether the word "heirs" is to be construed strictly as meaning those who at his death would inherit real estate from the insured, or is to be taken as meaning those to whom personal property of the insured would be distributed if he died intestate. The administrator of Mary Greene, the mother of the insured (she having died since the beginning of this suit), and the brothers and sisters of the insured, contend that the word "heirs" is to be construed under the law of New York, and that, whether it is to be interpreted technically as those inheriting real estate, or only as next of kin, in either case, by the New York law, the widow, Sarah L. Greene, takes nothing. It is contended by the association (which has paid \$1,000 to the widow) and by the widow that, even if the New York law is to control the meaning of "heirs," the court must construe the word in accordance with that law to mean those to whom the proceeds of the policy would have gone had it been part of his estate and he had died intestate, and in that case by the intestate statutes of New York the widow would receive a moiety of the proceeds of the policy.

The application was made and delivered to the agent of the company in New York, and the certificate or policy was delivered by an agent of the company in New York to the insured. All payments were made in New York by the insured to an agent of the company, both those accompanying the original application and all subsequent ones. These

¹ This short statement of facts is substituted for that of the Reporter. — Ed.

² Part of the opinion is omitted. — Ed.

circumstances, under the decision in *Assurance Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, might seem to justify the conclusion that the contract, having been made in New York, should be construed by the New York law, and thus that the word "heirs," within the intention of the parties, should be construed to be "heirs" as interpreted by the New York law, rather than as interpreted by that of Ohio. I do not propose, however, to rest the decision in this case on its likeness to the case of *Assurance Soc. v. Clements*. There are some additional circumstances in this case which may, perhaps, distinguish this case from that. The policy was to be approved and issued in Ohio. The policy was to be payable there. In cases where both parties are interested in the construction of the insurance contracts, these circumstances are sometimes regarded as important.

But I do not think this a case for construing the terms of a contract to reach the common intent of two parties, and it does not seem to me that the same rules apply. What we are construing here is language of the insured designating the beneficiary of his bounty after his death. By the by-laws of the association he was given power to change this designation at any time before his death. The association reserved no right or power to object to any designation or change of designation, provided the beneficiary named was within those classes of persons to whom, by statute, charter, and its own by-laws the association was permitted to pay policies. Now, it must be conceded that, as those classes are limited by the law of Ohio, the terms used to describe them in the law must be construed according to the law of the State. Therefore the association had no power to agree to pay policies to any person not a member of the family of the insured or not an heir of the insured, as "family" and "heir" are defined by the law of Ohio. Within these classes, however, the association was entirely indifferent who the designated beneficiary might be. It is conceded that each of the claimants at the bar is within the requirement of the statute of Ohio. Subject to the limitation of the statute, the construction of the language of the designation becomes solely a matter of determining the intent of the insured. In other words, the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances. *Bolton v. Bolton*, 73 Me. 299; *Duvall v. Goodson*, 79 Ky. 224-228; *Mutual Ass'n v. Montgomery*, 70 Mich. 587, 38 N. W. 588; *Silvers v. Association*, 94 Mich. 39, 53 N. W. 935; *Chartrand v. Brace*, 16 Colo. 19, 26 Pac. 152; *Phillips v. Carpenter* (Iowa), 44 N. W. 898.

This designation was made in New York, by one domiciled in New York, for distribution to his family, most of whom lived in New York. If we were construing this language as a clause in a will, whether the money bequeathed were payable in New York or Ohio, there can be no doubt that the word "heirs" would be construed under the New York law, because that of the domicile of the testator. *Harrison v. Nixon*, 9 Pet. 483; *Anstruther v. Chalmer*, 2 Sim. 1; *Yates v. Thompson*,

3 Clark & F. 544 ; *Enohin v. Wylie*, 10 H. L. Cas. 1 ; *Wilson's Trusts* (*Shaw v. Gould*), L. R. 3 H. L. 55 ; *Parsons v. Lyman*, 20 N. Y. 103 ; *Freeman's Appeal*, 68 Pa. St. 151. Following this testamentary rule of construction, I have little difficulty in concluding that Greene intended that the language he used should be construed by the law of New York. Indeed, without the aid of authority, I should reach the same decision. Greene lived in New York, and all the possible objects of his bounty lived there. Is it reasonable to suppose that he would use language to describe them, intending it to be interpreted by the law of some other State? I cannot think so. Nor is there anything in the circumstances of his change of the beneficiary to lead to a different result. If the correspondence between the insured and the association at the time the beneficiary was changed is competent, it shows that he wished the proceeds of the policy to go to his estate, for he used the words "heirs, administrators, executors, and assigns." To this the association responded that the law of its creation forbade a designation to his "estate," but that he might designate his "heirs," which he did. This shows that his purpose was to leave it to those to whom it would go, were it part of his estate and he were to die intestate, and he used the word "heirs" as most nearly accomplishing that purpose. Had he been permitted to designate his estate as the payee, certainly the proceeds of the policy would have been distributed under the New York law. May we not presume that, with the same purpose in view, he intended that the designation he was permitted to make should receive a New York construction? The mere fact that he was cautioned that the Ohio law did not permit him to direct payment to his estate does not, it seems to me, show that he intended the words he used to receive an Ohio construction. He knew that the association did business outside of the State of Ohio. He knew that, so large was the number of New York certificate holders, the annual meeting of the association was held in New York. Was it not most natural for him to think that, so long as he designated persons within the limitation permitted by the Ohio law, the particular individuals named by him should be determined by giving to his language the meaning it would have at his home, where the money was ultimately to come and where the beneficiaries lived? We can be certain that Greene regarded the proceeds of this policy as part of his estate which he was leaving to be distributed at his death; and we may be sure that he did not distinguish between language used in the designation and that which he would have used in a will concerning his personal estate.

In *Mayo v. Assurance Soc.*, 71 Miss. 590, 15 South. 791, it was held that the proceeds of a policy of life insurance issued in New York, and payable to the heirs of the insured, who was domiciled in Virginia, were to be distributed under the laws of the latter State. In *Association v. Jones*, 154 Pa. St. 107, 26 Atl. 255, an association of Ohio, organized under exactly the same law as the complainant, issued a policy payable to the legal heirs of the insured, who was domiciled in Pennsylvania.

It was held that the court must determine who the legal heirs of the insured were by the law of his domicile, to wit, Pennsylvania. The court said (page 108, 154 Pa. St., and page 255, 26 Atl.):

"This contract is made with William D. Jones, of Philadelphia, and it fixes his domicile, and promises to pay the fund to his legal heirs. His domicile being thus here, a promise to pay to his legal heirs must be such as are determined by the intestate laws of such domicile."

In *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253, a policy was payable "to the devisees, or, if no will, to the heirs, of the said William Jones." The association was organized under the laws of Illinois. It was held that there was no disposition of the proceeds of the policy by the will. It was held that the word "heirs" meant those distributees to whom personal property of the insured would go if he died intestate. It was contended that the words should be given effect according to the law of Illinois, and as, by those laws, the husband's personal property would go to the widow in case of his intestacy, she was entitled to the whole fund. The court held that, as the policy was issued to Jones as a citizen of Pennsylvania, the promise to pay to his heirs must be treated as a promise to pay according to the intestate law of his domicile, and that it was a case for the application of the common-law rule "that personal property has no situs, but follows the person of the owner, and is distributed according to the intestate laws of such owner's domicile."

There are other cases in which the same result was reached, though no question seems to have been raised on the point by counsel or considered by the court. *Gauch v. Insurance Co.*, 88 Ill. 251; *Britton v. Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675. It may be noted, in connection with the two Pennsylvania cases just cited, that the policy in this case expressly insures the life of John G. Greene, of Schenectady, N. Y. I conclude, both on reason and authority, that the word "heirs," as used in the certificate or policy in the case at bar, is to be construed according to New York law.

And what does the word "heirs" mean, according to the New York law, used in a policy of life insurance? It is well settled in many States that where "heirs" is used, in a will or other document having a testamentary effect, to designate persons who are to receive personal property, it shall be held to mean those persons to whom the personalty of the giver would be distributed if he were to die intestate. Of course, as already said, technically it means those who would inherit the giver's real estate in case of his intestacy. But courts recognize that the word is given in common parlance — *ut loquitur vulgus* — a much wider meaning, and includes all those who would succeed, under the intestate laws of the State, to the enjoyment of the property in question. *Association v. Jones*, *supra*; *McGill's Appeal*, 61 Pa. St. 46; *Eby's Appeal*, 84 Pa. St. 241; *Sweet v. Dutton*, 109 Mass. 589; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 2 Ired. Eq. 72; *Croom v. Herring*, 4 Hawks, 393; *Corbitt v. Corbitt*, 1 Jones, Eq. 114; *Henderson v. Henderson*, 1 Jones (N. C.), 221; *Alexander v. Wallace*, 8 Lea, 569;

Collier v. Collier's Ex'rs, 3 Ohio St. 369; *Doody v. Higgins*, 2 Kay & J. 729. . . .

With this construction, we must refer to the statute of distribution of New York to determine how the money in this case must go. Paragraph 2, § 75, tit. 3, of chapter 6 of the statutes of New York on wills and decedents' estates (4 Rev. St. [8th ed.], p. 2565) provides as follows:—

"That if the deceased leave no children the widow shall take a moiety of the personal estate."

Paragraph 6 provides:—

"If the deceased shall leave no children and no representatives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother, and brothers and sisters, or the representatives of such brothers and sisters."

The decree of the court must be, therefore, an order distributing the proceeds of the policy, one-half to the widow, Sarah L. Greene, and one-half to be equally divided between the administrator of Mary Greene, the mother, and the brothers and sisters of John L. Greene, including, as one of the equally sharing distributees, the son of his deceased sister. The widow, Sarah L. Greene, will, of course, be charged with the \$1,000 already paid her by the complainant. The costs will be paid out of the fund.

LONDON ASSURANCE v. COMPANHIA DE MOAGENS.

SUPREME COURT OF THE UNITED STATES. 1897.

[Reported 167 *United States*, 149.]

THE respondents herein duly filed their libel in admiralty against the appellant, the London Assurance, in the United States District Court for the Eastern District of Pennsylvania, in a cause of marine insurance, to recover upon a policy of insurance issued by the company upon some 33,000 (being part of a cargo of about 80,000) bushels of wheat, of which the respondents were the owners, the 33,000 bushels being valued in the policy at \$40,887. The policy was dated December 8, 1890, was issued for \$20,000, and covered the wheat when shipped on board the steamer "Liscard," at New York, bound for Lisbon, Portugal. . . . In the body of the certificate and directly under the subject of the insurance (33,000 bushels of wheat), stamped in red ink, are the words:—

"Free of particular average unless the Vessel be sunk, burned, stranded, or in collision."

On the face of the certificate and on the right-hand side thereof, and at a right angle with the body of the certificate, the following language is printed:

"It is hereby Understood and Agreed that in all cases of loss or damage to the interest insured under this Certificate, the same shall be reported to the Corporation in London as soon as known or expected, and be paid in Sterling at the offices of the Corporation, No. 7 Royal Exchange, London, at the rate of four dollars and ninety-five cents (\$4 95-100) Gold to the Pound Sterling. Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance."

The cargo was received on board in New York harbor; before starting, the "Liscard" was injured by collision with another vessel. As a result of this collision the "Liscard," having proceeded upon her voyage, shipped water in a heavy gale, and the cargo was thereby damaged. This libel was thereupon brought. The District Court gave judgment in favor of the owners of the wheat, and the Circuit Court of Appeals affirmed the judgment. The insurance company then applied to this court and obtained a writ of *certiorari* to review the judgment.¹

PECKHAM, J. We think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, § 280, says: "But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice. . . . The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States, where the court said, that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

The case referred to in the above section is *Andrews v. Pond*, 13 Pet. 65, in which Mr. Chief Justice Taney, in delivering the opinion of the court, said; "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, — and if the interest

¹ This statement of facts is condensed from that of the Reporter; part of the opinion is omitted. — Ed.

allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In *Bell v. Bruen*, 1 How. 169, a letter of guaranty was written in the United States and addressed to a house in England, and this court held that "It was an engagement to be executed in England, and must be considered and have effect according to the laws of that country," citing *Bank of the United States v. Daniel*, 12 Pet. 54, 55.

In *Scudder v. Union National Bank*, 91 U. S. 406, the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of the performance of a contract regulated matters connected with its performance, and that matters bearing upon the execution, interpretation, and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyds. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 446, 453.

It appears in evidence also that there were in use two well-known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, "free of particular average *unless caused* by stranding, sinking, burning or collision;" the other clause reads, as in this case, "free of particular average unless the vessel be stranded, sunk, burned or in collision." The clause in use in this certificate was termed the English clause. Many agents of English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the "caused by" clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case.

Referring then to the English law upon the question as to the meaning of this language, the English courts many years ago decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, "free of particular average unless the vessel be stranded," meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy.¹ . . .

¹ The learned judge here examined the following cases: *Burnett v. Kensington*, 7 T. R. 210; *Harman v. Vaux*, 3 Camp. 429; *Barrow v. Bell*, 4 B. & C. 736; *Kingsford v. Marshall*, 8 Bing. 458; *Thames, etc. Ins. Co. v. Pitts*, [1893] 1 Q. B. 476; *The Glenlive*, [1894] P. 48. — ED.

From this review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided. It is not material now to inquire as to the course of reasoning by which this construction of the language of the memorandum was reached. Having decided, more than a hundred years ago, what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use, under such circumstances, shows that they have adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word "stranding," but subsequently, and at different times, the words "burned, sunk, or in collision" were added to it, and they must all be given the same construction, as an exception, that has been given to the word "stranding," and, if any of them occur, the memorandum is struck out and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question.

Our conclusion is, that the underwriters are liable for the loss, under proper rules of adjustment. . . .

*Decree affirmed.*¹

BETHELL v. BETHELL.

SUPREME COURT OF INDIANA. 1876.

[Reported 54 Indiana, 428.]

WORDEN, C. J. Action by the appellee, against the appellant. The complaint contained two paragraphs. The first went out on demurrer. A demurrer for want of sufficient facts was filed also to the second, but was overruled, and exception taken. Such further proceedings were had as that final judgment was rendered for the plaintiff.

Error is assigned upon the overruling of the demurrer to the second paragraph of the complaint.

The second paragraph of the complaint alleges, that, on the 13th of May, 1869, by a deed of conveyance between the appellant and his wife and the appellee, all of whom were and had been citizens of War-

¹ See Greer v. Poole, 5 Q. B. D. 272; Shift v. La. Ins. Co., 6 Mart. n. s. 629; 13 Clunet, 213 (RG. 16 June, '83).—ED.

rick County, Indiana, for more than thirty years, the appellant granted, bargained, and sold to the appellee certain lands in Missouri, described by sections, etc., in consideration of four thousand eight hundred dollars.

The deed is copied into the paragraph, and contains the words "grant, bargain, sell, and convey," and purports to be upon a consideration of four thousand eight hundred dollars.

The paragraph then avers that, by the law of the State of Missouri at said date, the defendant, by said deed of conveyance, covenanted to and with the plaintiff that he was seised of an indefeasible estate of inheritance in fee simple, and that said defendant, by force of said law, might be sued upon the same in the same manner as if said covenant had been inserted in the deed.

The paragraph here sets out a section of the Missouri statutes, which corresponds with these allegations, and proceeds to allege, further, that at said date the defendant was not seised of an indefeasible estate of inheritance in fee-simple to said real estate, but, on the contrary, that he had not nor has he yet any title whatever to any part of said lands. That defendant was never at any time in possession of said lands, nor were they ever in the possession of the plaintiff; and that while the plaintiff was ignorant of said want of title, he paid a large amount of taxes on said lands, to wit, some eighteen months, after said conveyance.

The deed, as set out, contains no covenants whatever, either express or implied. There is no general warranty, as provided for by our statute. The words "grant, bargain, sell, and convey" do not imply any covenants in a conveyance in fee, though the words, "grant" or "demise" may imply a covenant of title, in a lease for years. This proposition was decided, after an exhaustive examination of the authorities, in the case of *Frost v. Raymond*, 2 Caines, 188. So that if the deed is to be regarded as containing the covenant of seisin, or, indeed, any other covenant, it must be by virtue of the law of Missouri, set out in the pleading.

Hence, the question arises, whether a deed, executed in Indiana, between her citizens, for land in another State, but containing no covenants whatever by the law of Indiana, shall be construed as containing, by implication, such covenants as would, by the law of the State where the land lies, be regarded as contained in the deed.

This is an interesting and a somewhat novel question. We have been furnished with able briefs by counsel for the respective parties, who have cited the general authorities upon the point, but yet no case has been found entirely in point.

There can be no doubt that the law of Missouri, alone, can be looked to in order to determine whether the deed in question was sufficient to pass the title. In the sale and conveyance of real estate, so far as regards the capacity of the parties to convey and hold, respectively, the formalities necessary to a valid transfer, the dominion and enjoy-

ment of the same by the vendee, and the right of succession thereto, and all other incidents to the acquisition of the land, the *lex rei sitæ* governs.

But it does not, therefore, necessarily follow that the *lex rei sitæ* so far governs conveyances made elsewhere as to change their character as mere conveyances and invest them with the character of personal covenants not necessary to the transmission of the property.

We are referred by the counsel for the appellee to the case of *McGoon v. Scales*, 9 Wall. 28, in which Mr. Justice Miller said: "It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated, we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

This was said, however, in reference to the question whether the title did actually pass by a certain deed. The question was, whether "the effect and construction" of the conveyance were such as to pass the title.

As we desire to decide nothing but the exact question presented here, and as the distinction between covenants running with the land and those not running with the land may perhaps be supposed to enter into the question, we proceed to consider the character of the covenant alleged to have been broken. The supposed covenant, of which a breach is alleged, is the covenant of seisin. And it is alleged that the land was never in the possession of the defendant or the plaintiff. There are some cases holding that the covenant of seisin runs with the land, where the grantor was in possession and delivered possession to the grantee. But all the cases, so far as we are advised, hold, that where the grantor is not in possession and does not deliver possession to his grantee, the covenant of seisin, if the grantor had no title, is at once broken and does not run with the land. In the case of *Chambers' Adm'r v. Smith's Adm'r*, 28 Mo. 174, it was held, that "If there be a total defect of title, defeasible and indefeasible, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and cannot pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case, the breach is final and complete; the covenant is broken immediately, once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right,—if an estate in fact, although not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land and passes from party to party, until the paramount title results in some damage to the actual possessor, and then the right of action upon the covenant vests in the party upon whom the loss falls."

The supposed covenant in this case, then, was one that did not run with the land; it was purely personal and broken as soon as entered into; it was not so connected with the land that any subsequent

grantee thereof could take advantage of it. The question is therefore narrowed down to this: can a deed, executed in Indiana, between citizens thereof, containing no covenants whatever according to the law of Indiana, be held by virtue of the law of Missouri, where the land lies, to contain a covenant not running with the land but broken as soon as entered into? We think this question must be answered in the negative. A covenant of seisin not running with the land is purely a personal covenant, broken as soon as made, and has nothing whatever to do with the transmission of the title to the land. As a general rule the *lex loci contractus* determines the construction and effect of contracts. And we think that where a deed is made, as above stated, the question whether it contains such a covenant is to be determined by the law of the place where it is made.

The case does not fall within another rule of law well established, viz., that where a contract is to be performed in a place different from that in which it is made, the law of the place of performance is to govern the contract. Here, the contract was completely executed and was not executory. By the terms of the deed there was nothing further to be done by the grantor, either in Missouri or elsewhere. There were no stipulations that bound him to the performance of any future act. Whatever title did or could pass by the deed passed immediately upon its execution and delivery, and there was nothing further to be done by the grantor.

As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred and obligations imposed thereby, beyond the mere passing of the title. The case of *Thurston v. Rosenfield*, 42 Mo. 474, is closely analogous in principle. Rosenfield failed in business in New York, and in that State made an assignment of his effects, including certain real estate in Missouri, in which assignment certain creditors were preferred. The assignment was regularly executed and acknowledged, so as to pass the title to the land in Missouri, but according to the laws of Missouri it was void on account of the preference given to some of the creditors. But it was held, as the parties were residents of New York and New Jersey, and as the assignment was valid by the law of New York where it was executed, and as the policy of the Missouri law was to deny preferences in that State, that the assignment was governed by the law of New York, and it was upheld accordingly. See Whart. Conf. Laws, § 276.

The law of Missouri cannot extend beyond her territorial limits so as to make an instrument containing no covenants, executed in another State, between citizens thereof, contain such a covenant as that alleged here to have been broken.

The case of *Carver v. Louthain*, 38 Ind. 530, was an action upon the covenants contained in a deed for the conveyance of land situate in the State of Illinois. The question does not seem to have been made whether the covenants were governed by the law of Illinois, or other-

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BANK v. HALL.

1 PENNSYLVANIA. 1892.

[50 *Pennsylvania*, 466.]

Plaintiff sues upon notes made by C. M. Crandall, in his own name, and seeks to charge the partners of Crandall in a business in which the other notes, of which these were renewals, were relied upon to establish the alleged partnership existing between Crandall of the one part, and the other part, dated February 24, 1885. If this contract create a partnership as to creditors it cannot be successfully set aside. That all the evidence in the cause taken together tends to show that no partnership was created by anybody but Crandall; and inasmuch as all the assignments were predicated upon the assumption that such partnership was created by that contract, it is evident that if that assumption was false the plaintiffs could not have been injured by the rulings complained of, and hence, though there may have been technical error in the judgment, the judgment ought not to be disturbed. It is, therefore, pertinent to inquire what were the rights and liabilities of the parties under that contract, although the question is not directly raised by any of the assignments of error.

The whole scope of the contract indicates that a loan of money to Crandall by the other parties in consideration of a share of the profits of a business in which he was to embark was intended, and not a contribution to the capital of a partnership of which the parties were to be

¹ Part of the opinion only is given. — Ed.

the members. The parties of the second part covenanted to furnish three thousand dollars to Crandall, and not to a firm; they were to furnish it to him from time to time as he might require it, and its repayment to them was to be secured by a chattel mortgage upon the tools, machinery, furniture, and fixtures of every kind and nature belonging to or connected with the business in which it was to be used. Crandall might repay it at his option before the expiration of the full term for which he had the right to demand it; and, although it was stipulated that the money so to be furnished should be used in the business contemplated, the right of entire control of that business was recognized to be in, and was expressly conceded to Crandall. And it was further stipulated that nothing in the writing contained should be construed to create a partnership between the parties thereto except as to the profits of the business. These provisions are all consistent with the relation of borrower and lender, and some of them are inconsistent with any other relation. It is therefore manifest that that relation was intended to be established; and the next question is whether, in spite of the intention of the parties, the community of interest in the profits constituted them a partnership as to creditors.

If this were a Pennsylvania contract the question would be answered in the negative by the act of April 6, 1870, P. L. 56, and by *Hart v. Kelly*, 83 Pa. 286. But, although it was made in this State, it was to be executed in the State of New York. Such cases are stated by approved text writers to be an exception to the general rule that the *lex loci* applies in respect to the nature, obligation, and construction of contracts. That exception is thus stated by Judge Story: "But where the contract is either expressly or tacitly to be performed in any other place the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." *Conflict of Laws*, § 280. Chancellor Kent, after stating the exception in substantially the same terms, adds that it "is more embarrassed than any other branch of the subject (the *lex loci*) by distinctions and jarring decisions." 2 Com. 459. But whatever conflict of authority there may be in respect to the exception, all agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance. *Brown v. Railroad Co.*, 83 Pa. 316; *Scudder v. Union National Bank*, 91 U. S. 406. Under the present contract it is clear there could be no liability to third persons without a performance as between the parties to it, and therefore the question of such liability would necessarily be connected with or grow out of such performance and be determinable by the law of New York.

More than a century ago Chief Justice De Grey, in *Grace v. Smith*, 2 Wm. Bl. 998, laid down the proposition that "every man that has a share of the profits of a trade ought also to bear his share of the loss." In a few years the principle thus stated became recognized as a part of the law of England, and so continued until 1860, when it was over-

thrown by the House of Lords in *Cox v. Hickman*, 8 H. L. C. 268. On this side of the Atlantic, and especially in the State of New York, it was accepted without question, so far as I have observed, as to the soundness of the reasons put forth in support of it, until it was exploded in England. . . .

It is said, however, in *Hackett v. Stanley*, 115 N. Y. 625, . . . that "exceptions to the rule (that participation in profits of a business renders the participant liable to creditors) are, however, found in cases where a share in profits is contracted to be paid, as a measure of compensation to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise." It is not material to inquire how much more of the rule is left by this exception than was left by *Cox v. Hickman*. It is enough that the present case comes within the letter and the spirit of the exception. The parties who made the loan and who are now sought to be held liable as partners had no voice or part in the prosecution of the business either as principals or otherwise, nor had they an irrevocable right to demand a share of the profits as was the case in *Hackett v. Stanley*. The right of control, or any voice in the control, an incident of proprietorship, was denied to them. And the implication of partnership from community of interest in the profits was excluded by an express stipulation, the absence of which in *Hackett v. Stanley* was thought to be worthy of notice: and their right to demand a share of the profits was to terminate upon repayment of the money advanced at the end of five years, or sooner at the option of Crandall. In all its material provisions the contract under consideration is not distinguishable from that in *Curry v. Fowler*, 87 N. Y. 33, or from those provisions of the contract in *Hackett v. Stanley* which it is there conceded would create no other relation than that of borrower and lender.

For these reasons the defendants as to whom issue was joined are not liable to the plaintiff, and therefore the judgment must be affirmed.

BALDWIN v. GRAY.

SUPREME COURT OF LOUISIANA. 1826.

[*Reported 4 Martin, New Series, 192.*]

PORTER, J.¹ The facts in this case do not appear to be controverted; the only matter disputed is the legal obligations which arise on them.

The plaintiff was agent for the steamboat "Fayette," of which the defendant was part-owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of

¹ Part of the opinion only is given. — Ed.

this boat were defendants, and also for moneys paid for the expenses of the boat while in this port.

It is insisted the defendant is liable *in solido*, because the contract by which he became interested in this vessel was entered into at Pittsburgh, in the State of Pennsylvania, where the common law prevails.

This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us was made in this State, and must be regulated by the *lex loci contractus*. This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in another country, or the performance is to be in another State. A foreigner coming into Louisiana who was twenty-three years old could not escape from a contract with one of our citizens by averring that according to the laws of the country he left he was not a major until he reached the age of twenty-five.

We think, therefore, that the defendant is only liable for his virile portion of the moneys laid out and expended on the steamboat "Fayette." *Caroll v. Waters*, 9 Mart. 500.

KING v. SARRIA.

COURT OF APPEALS, NEW YORK. 1877.

[Reported 69 New York, 24.]

FOLGER, J.¹ The plaintiffs seek to recover a sum of money from the defendant Sarria, upon contract. They do not show that he in person made with them the contract which they allege. It is, indeed, one of the conceded facts in the case, that the contract was made, as matter of fact, by persons other than Sarria. To succeed, then, in their action, they must show that those persons in some way represented Sarria, and had authority to bind him thereto, to the full extent to which the plaintiffs seek to hold him. To show such authority, proof is made that Sarria was a partner with Grau & Lopez, and that the latter two, under the firm name of Grau, Lopez & Co., made the contract. If nothing more appeared in the case, this would suffice for the plaintiffs; for, by virtue of the relation of partnership, one partner becomes the general agent for the other, as to all matters within the scope of the partnership dealings, and has thereby given to him all authority needful for carrying on the partnership, and which is usually exercised by partners in that business. *Hawken v. Bourne*, 8 M. & W. 703. Indeed, it is as agent that the power of one partner to bind his co-partner is obtained

¹ Part of the opinion only is given. — Ed.

and exercised. The law of partnership is a branch of the law of principal and agent. *Cox v. Hickman*, 8 H. of L. Cas. 268; *Baring v. Lyman*, 1 Story, 396; *Worrall v. Munn*, 5 N. Y. 229. In the case first above cited (8 M. & W. *supra*), it is added: that any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one partner possesses as the general agent of the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made. It is manifest, however, that this remark is to be qualified, when taken in connection with any statute law, which has provided for the formation of limited partnerships, where that statute law is operative. A due observance of such statutory provisions limits the liability of the special partner. It limits, too, the authority of the general partner, as the agent of the special partner, and fixes beforehand the extent to which, as agent, he may bind the special partner. It is hardly necessary to say that when a limited partnership is duly formed and carried on under our statute, though the general partner is the agent for all the partners, with powers full enough to transact all the business of the firm, and to bind it to all contracts within the scope of that business, he gets no authority, from his relation as partner and agent of the special member of the firm, to fix upon him any greater liability than that which has been stipulated for. These principles are stated here, not as new or forgotten by any one, but as the basis upon which the determination of this case will rest.

It turned out that the partnership of Grau, Lopez & Co. was created by a formal instrument in writing, and that, by its terms, the liability of Sarria was special, and limited in extent to a fixed amount. That instrument (it is found as fact by the learned referee), and all the doings of the three partners under it have been in due accord with the commercial code of Spain, of which nation they were citizens, and under whose government and laws they were living and acting when they executed the instrument, and formed and carried on the partnership. And it is proven and found as fact in the case, that when, in due pursuance of the Spanish law, a person has, as did Sarria, entered into such a partnership with others, and has, as did Sarria and his partners, duly observed and carried out the provisions of the law and the terms of their agreement, the liability of the special partner, as was Sarria, is limited to the amount of funds which he has contributed according to his agreement. It is well to observe here, that the learned referee has found that Sarria never had any partnership connection with Grau & Lopez, other than that of a limited partner; that he did not use, nor permit to be used, his name in the firm name; that he did not, by any representation, act, or omission, hold himself out, or render himself liable, as a general partner. We have then, Sarria himself making, in person, no contract with the plaintiffs, and giving a special and express authority only, to Grau & Lopez to make

one, which authority was in exact pursuance of law. Those who deal with one as agent do so at their peril, if it turns out that he had no authority from a principal; and where they rely upon his delegated authority as that of a partner, and know that the partnership was created in another country, must they not look to it, to see how far that law, and the partnership under it, gave power to the acting partner? As then, the power of Grau & Lopez to bind Sarria by contract was that of partners, that is, of agents; and as their authority was lawfully restricted, so that they could not bind him in a liability greater than that named in the contract of partnership, it seems to follow that the plaintiffs have no contract which can be enforced against Sarria, otherwise or further, than is provided for by the terms of that authority. Nor did Grau & Lopez make the contract with the plaintiffs in the name of Sarria, nor with any special claim of right to represent him. They made it in the name of Grau, Lopez & Co., and claiming only to represent that partnership. As to Sarria, the unnamed partner, they were agents, acting under an authority special, express, limited, and could give to the plaintiffs no more claim upon Sarria than such an authority empowered them. The plaintiffs were subject, in these dealings with Sarria, to the limitations which he had lawfully put upon the powers of his agents. Again, to state familiar doctrine, no one, in dealing with an agent, may hold the principal to a contract which was not within the authority of the agent to make; nor where there is an express written authority, is it to be enlarged by parol, or added to by implication. It is to be construed, as to its nature and extent, according to the force of the terms used, and the objects to be accomplished.

But it is claimed by the learned counsel for the plaintiff that the Commercial Code of Spain cannot have an extraterritorial effect; and that one dealing in this State, in which that law does not rule, cannot avail himself of its effect. If this be so, it must be because the law of this State forbids a foreigner, in such a case as this, from invoking the aid of any law of his domicil. But one country recognizes and admits the operation within its own jurisdiction of the laws of another, when not contrary to its own public policy, nor to abstract justice, nor pure morals. It does this on the principle of comity. It has been so long practised that it is stated as a principle of private international jurisprudence, that rights which have once well accrued by the law of the appropriate sovereign are treated as valid everywhere. Westlake on Priv. Int. Law, art. 58.

The principle, from which originates the influence exercised by the law of a foreign State, in determining the status or rights of its subjects in another country, is thus well stated. It is the necessary intercourse of the subjects of independent governments, which gives rise to a sort of compact, that their municipal institutions shall receive a degree of reciprocal efficacy and sanction within their respective dominions. It is not the statutes of one community which extend their controlling power into the territories of another; it is the sovereign of

each who adopts the foreign rule, and applies it to those particular cases in which it is found necessary to protect and cherish the mutual intercourse of his subjects, with those of the country whose laws he adopts. Per Sir Samuel Romilly, *arguendo*, *Shedden v. Patrick*, 1 Macqueen's H. of L. Cases, 554.

It cannot be said that there is a rule of exclusion, on account of this particular law being contrary to our public policy. It much resembles our own statute for the formation of limited partnerships, and, with some difference in detail, it aims at the same beneficial result, which ours has in view; nor may we say, with our statute before us, that the law is opposed to good morals or abstract justice. There cannot be that exclusion, because it is a rule of our law not to give in any case to a foreigner the benefit of the law of his domicile.

Mr. Nash was correct, in opening his argument, in saying that this is a case of first impression in this State. Hence it is, that in looking for the reasons upon which it is to be decided, we have to be governed by the analogies of the law, rather than cases in point. Let us see where those analogies tend. If one marry, where marriage is only a civil contract, his marital relation will be held valid, in a country where a religious ceremony is, by its law, deemed vital. The same principle prevails with us, though not called into application by such a state of facts. It is an established principle that the law of the place where contracts purely personal are made, must govern as to their construction and validity, unless they are made to be performed in another State or country. *Curtis v. Leavitt*, 15 N. Y. 227; *Chapman v. Robertson*, 6 Paige, 627. This contract of partnership was made to be performed in Cuba. The contract made by the partnership with the plaintiffs, it may be conceded, was made in New York, to be performed here. The contract with the plaintiffs will be construed and enforced by the laws of this State, and they will determine the nature and extent of the liability upon it, of the partnership, the maker of it. The former, the contract of partnership, between the members of the firm, will be construed and weighed by the laws of Spain, and they will determine the liability of Sarria, and the extent of the authority given by him to Grau & Lopez. In *Comm. of Ky. v. Bassford*, 6 Hill, 526, the Supreme Court of this State maintained an action on a bond, given to secure the payment of money, to be raised and distributed by a lottery, on the ground that it was a valid and legal obligation in Kentucky, where it was assumed that it was made, and where it was to be executed, though opposed to the statutory policy of this State. And the rule has been so far carried, in one jurisdiction, in recognizing the law of the domicile, as to enforce a claim of property in slaves. *Madrazo v. Willes*, 3 Barn. & Ald. 353; see also, *Greenwood v. Curtis*, 6 Mass. 358; *Com. v. Aves*, 18 Pick. 215; *The Antelope*, 10 Wheat. 66; and so far in another jurisdiction as to hold good a sale of lottery tickets in this State. *McIntyre v. Parks*, 3 Metc. 207.

There is a close analogy between this case and questions arising as

to the authority of the master of a vessel to bind his owners in a foreign port. Though the solution of the latter depends upon the rules of the maritime law more particularly, yet the relation of the master and the owners is but a branch of the general law of principal and agent, and so the ultimate reason of each starts from the same root. It is not a new doctrine, that a master of a vessel cannot bind her owners in a foreign port, to any greater liability than will be recognized by the law of their domicil. *Pope v. Nickerson*, 3 Story, 465. And the rule there laid down has been recognized and applied in the Court of Queen's Bench, on the principle that the power of the master to bind the owners personally is but a branch of the general law of agency. *Lloyd v. Guibert*, 6 Best & Smith, 100; s. c. in Exch. Ch., *id.* That case, also, in its reasoning, recognizes the distinction which we have stated, between the law which is to affect the question of the authority to make a contract, and that which is to determine the validity and effect of the contract when made. It was urged there, too, by counsel, but without effect, that the law of the place where the contract was made, and of the place where it was to be performed, was different from the law of the domicil of the defendants. It was also urged that the contract entered into was *bona fide*, in the ordinary course of business by the master, and within the scope of his ostensible authority to contract; and that his power could not be narrowed by provisions of foreign law, unknown to the party dealing with him, more than by secret instructions, but urged without avail. So, also, in the case of *The Moxham*, 1 P. Div. 107, it is pertinently said: "One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent, *qua* agent, with foreigners; that is to say, it may affect the nature and extent of his agency."

So, too, in actions of tort, it has been held that an extraterritorial law will furnish a defence in the courts of England. *Phillips v. Eyre*, Law Rep. 6 Q. B. 1. It is said that an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct, exceptional legislation. See also *Dobree v. Napier*, 2 Bing. N. C. 781.

The effect of the judgments in these cases is this: That where the essentials of a contract made under foreign law are not hostile to the law and policy of this State, the contract may be relied upon and availed of in the courts of this State. If the substance of the contract is against that law and policy, our judicatories will refuse to entertain it and give it effect. Hence, the contract of partnership made by Sarria, in Cuba, may be availed of by him here.¹

¹ *Acc. Barrows v. Downs*, 9 R. L. 446; *Hastings v. Hopkinson*, 28 Vt. 108.—Ed.

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH
COMPANY.

COURT OF APPEAL. 1890.

[Reported [1891] 1 *Queen's Bench*, 79.]

APPEAL from a judgment of DAY, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favor of one Broe, a stock-broker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before DAY, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.¹

LORD ESHER, M. R. In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business

¹ Arguments of counsel and concurring opinion of LINDLEY, L. J., are omitted.
— ED.

in Brazil. An English court has to construe it, and the first thing, therefore, that the English court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer; and a Brazilian lawyer for that purpose would be an expert. That is the first thing the court has to do. Then, when the court has got a correct translation into English, it has to do what it always has to do in the case of any such document, — either a contract, or such an authority as this, — that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be

done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document, he must have used it in the business sense given to it in Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly, — that is to say, that the contract shall be performed according to Brazilian law, — that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

Now, that I consider to be a mere expansion of the judgment of DAY, J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.¹

¹ LINDLEY and LOPES, L. JJ., concurred. See *Pattison v. Mills*, 1 Dow & Cl. 342; *Maspons v. Mildred*, 9 Q. B. D. 530; *Oliver v. Lake*, 3 La. Ann. 78; *Kerdake v. Clark*, *More's Notes*, 6.

As to the effect of a statute making a husband liable for the debts of his wife, a trader, upon the liability of a husband domiciled abroad, see *Hill v. Wright*, 129 Mass. 296. — ED.

HAMLYN AND CO. v. TALISKER DISTILLERY.

HOUSE OF LORDS (SCOTCH APPEAL). 1894.

[Reported [1894] *Appeal Cases*, 202.]

LORD HERSCHELL, L. C. My Lords, on the 27th of January, 1892, an agreement was entered into between Roderick Kemp & Co. of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Co. of London, under which Hamlyn & Co. were to supply to the distillery a patent drying machine which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn & Co. dried grain free on board at Carbost to their order or otherwise as required. The agreement concludes with a clause in the following terms: "Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England.

Shortly after the contract was entered into Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord ADAM and Lord M'LAREN, in the Inner House, Lord KINNEAR dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is, according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the court below is thus expressed by Lord ADAM: "So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*, that is, by the law of Scotland."

It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the

parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

The learned judges in the court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to

arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted the courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the courts of Scotland; and if according to the law of Scotland the courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the case. The courts in Scotland recognize the right of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the courts in Scotland would have recognized and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the courts of Scotland do enforce and give effect to an arbitration clause, and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the courts in Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the

Scotch courts, insist, by virtue of an agreement, that those courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail. For these reasons I move that the judgment appealed from be reversed.

The question then arises what course should be taken in the present case, whether the action should be stayed until the arbitration is completed or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. My Lords, I am quite satisfied, upon that part of the case, with the suggestion which will be made by my noble and learned friend who will follow me (Lord WATSON), and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

LORD WATSON. This action was brought in the Court of Session by a Scotch distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal, it is sufficient to say that the contract which was made in England, but fell to be mutually performed in Scotland, contains this provision: "Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way."

In defence, the appellants pleaded, "(1) No jurisdiction; (2) The action is excluded by the clause of reference." Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (KYLACHY), and, in the First Division, by Lords ADAM and M'LAREN, Lord KINNEAR dissenting. The learned judges of the majority were of opinion, with the Lord Ordinary, that, inasmuch as Scotland was admittedly the *locus solutionis*, the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view, the agreement to refer, being to arbiters unnamed, was plainly invalid; and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases

like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the court is not wholly ousted by such a contract. It deprives the court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*, 10 Court Sess. Cas. 3d Series (Macpherson), 892, where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating the rule of procedure, which was in force long before its date.

The first question in this appeal is, whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law; and, in that event, the further question arises whether the courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant.

Upon the first of these questions, I have been unable to arrive at the same conclusion with the courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be con-

strued according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration they were contracting with reference to the law of England.

Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that, according to a well-known principle of general law, all questions touching the remedy must be decided according to the rules of the forum in which the remedy is sought. They also contended that the Court of Session were not bound to recognize any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded.

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don v. Lippmann*, 2 Sh. & McL. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class refer to the action of the court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

The second reason advanced by the respondents for denying effect to the reference would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch courts are bound to give effect to every stipulation in a

foreign contract, unless it is shown to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply rooted and important considerations of local policy, that her courts would be justified in declining to recognize them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal acts, and I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure *in hoc statu*, in order that the matters in dispute may be settled by arbitration in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.¹

SECTION VI.

ASSIGNMENT.

LEE v. ABDY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1886.

[Reported 17 Queen's Bench Division, 309.]

ACTION against the trustees of the Reliance Mutual Life Insurance Society on a policy of insurance upon the life of Ellis Laurence Lee, deceased, by an assignee of the policy.

The defence (*inter alia*) stated as follows: At the date of the alleged assignment of the policy the said Ellis Laurence Lee was, and he remained till his death, a merchant domiciled in Cape Colony, and

¹ Lord ASHBOURNE delivered a concurring opinion; Lords MACNAGHTEN and MORRIS also concurred.

See 19 Clunet, 879 (Paris, 2 March, '92). — Ed.

the plaintiff was his wife. The title to the policy money is governed by the law of the said colony, according to which the alleged assignment, if executed, was and is void both by reason of the alleged assignee being the wife of the said Ellis Laurence Lee, and by reason that the said Ellis Laurence Lee was, and remained till his death, insolvent, and that his creditors are entitled to the policy moneys.

The plaintiff in her reply objected that the above statements of the defence showed no defence in law. It was ordered by WILLS, J., that the question of law whether, assuming the facts stated in the defence to be true, the rights of the plaintiff under the assignment of the policy were governed by the law of Cape Colony or by that of England, should be disposed of before the trial, and that the policy should be produced on the argument. It appeared in the course of the argument to be an admitted fact that the assignment was executed in Cape Colony, though it was not expressly so stated on the pleadings.

It appeared from the policy that it was effected by the deceased, Ellis Laurence Lee, who was described therein as resident at Kimberley, in South Africa, with the society, which was a life insurance company in London. It recited that the proposal for assurance, and the usual declaration by the assured, had been delivered at the office of the society by him, and that the truth of the statements therein were to form the basis of the contract. The policy money, together with such further sum, if any, as might be apportioned by way of bonus to the policy, was to be paid within three calendar months after proof satisfactory to the directors had been given of the death of the assured having happened within the term of the insurance. The policy contained the usual clause to the effect that the funds of the society should alone be answerable for any demand under the policy.

DAY, J.¹ If it were necessary to determine where the assured was domiciled when the policy was entered into, or where the policy must be considered as having been made, or where it is payable, there might be some difficulty in doing so upon the facts so far as they at present appear before us; but in the view I take it is unnecessary to go into those questions. It seems to me that quite independently of those considerations the assignment of the policy was invalid. The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a

¹ Arguments of counsel and the concurring opinion of WILLS, J., are omitted. —
ED.

chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties are contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was urged upon us that this conclusion would occasion great inconvenience to insurance companies. But I cannot see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected. I do not think that any additional difficulty occasioned by the assignment being governed by foreign law is of so much moment as was suggested. We were pressed with the authority of the case of *Lebel v. Tucker*, Law Rep. 3 Q. B. 77, but the decision there had relation to a bill of exchange, and I do not think that case is analogous to the present. It seems to me that the question which really arises here is one of the validity of a contract which is purely foreign, though such contract has relation to a chose in action which possibly arises upon an English contract. For these reasons I think our judgment must be for the defendants.¹

WILLIAMS v. COLONIAL BANK.

COURT OF APPEAL. 1888.

[Reported 38 Chancery Division, 388.]

COTTON, L. J.² These are two appeals, one in each action. Each action was brought by the executors of the late Mr. Williams, one against the Colonial Bank, and the other against the Chartered Bank of Australia. Each action was to prevent the defendant bank from dealing with and claiming as its own certain shares in an American railway company, the New York Central and Hudson River Railroad Company.

Mr. Williams at the time of his death was the owner of 1210 shares in that company, which were standing in his name, and his executors

¹ *Acc. Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651. But see *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419. — Ed.

² Parts of the opinions given and the concurring opinion of *BOWEN, L. J.*, are omitted. — Ed.

shortly after his death desired that those shares should be transferred from the name of the testator into their own names in the books of the company. Those shares, in parcels of ten, were represented by certificates, and the executors sent those certificates to Messrs. Thomas, who were brokers in London, for the purpose of their getting the shares transferred into the names of the executors. At first they did not sign the power of attorney on the back of the certificates, the certificates were sent back to them, and the two executors who had then proved signed the power of attorney on the back of the certificates, leaving it in blank, not naming any attorney nor filling in the name of any one as the person to whom the shares were to be transferred. The shares were not transferred into the names of the executors, and a member of the firm of brokers used the certificates for his own purposes. At first he deposited the whole of them with the Colonial Bank, as a security for money due to them from his firm. In the year 1883, two years and a half after the certificates had been signed and left with the brokers, the brokers got some of these certificates back from the Colonial Bank, and the same member of the firm deposited them for an advance with the Chartered Bank of Australia. In 1884 the firm became bankrupt, and inquiries were made by the executors as to what had become of their certificates which they had left with the firm up to that time, and apparently without inquiry, except an inquiry made in December, 1882, when the fraudulent member of the firm told them that the certificates were quite safe in America. They found that these certificates were not in the possession of the brokers, but of the banks, and the banks claimed to be entitled to them according to American law. The plaintiffs brought their actions to assert their title to the shares. At the time when the actions were commenced the shares were still standing in the name of the testator, and the certificates were in the same state as when handed to Thomas & Co. Mr. Justice Kekewich decided in favor of the defendants, and dismissed both actions. The question before us is, was he right in so deciding?

I will first say a few words as to the nature of these certificates. On the face of them each is a certificate that Mr. Williams was entitled to ten shares of \$100 each in the capital stock of the railroad company, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon in the form and manner prescribed by the regulations of the company. Then on the back there was this: [His Lordship read the indorsement.] The two executors who had proved signed these indorsements, leaving the names of the transferee and of the attorney in blank. The banks contend that, according to American law, and by the delivery of these certificates with signed transfers upon them, they became entitled both at law and in equity to the shares which are represented in the certificates as belonging to the testator; and that as the means were given to them of requiring a transfer by

the company of the shares into the name of the transferee, though as against the company they cannot be considered as having the rights of shareholders till their names are entered in the books of the company, yet as between transferor and transferee they have both the legal and equitable title. According to English law of course they would have no legal title. They would have a mere inchoate title, which, according to English law would not enable the transferees to hold the shares as against the executors who are the legal owners, but it appears that according to American law the transferee has not only an equitable title but a legal title to the shares. . . .

Now the question here whether Thomas & Co. gave the banks a good title to the certificates depends on transactions in England, and must be decided by the law of England, and not by the law of America. The law of America, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid effectual transfer of the certificates on the title to shares in an American company, but whether Thomas & Co. transferred to the banks a good title to the certificates depends on transactions in England, and in no way depends on the law of America. So also the question whether the plaintiffs have been estopped by any act of theirs from questioning the title of the transferees of Thomas & Co. must be a question of English law. . . .

LINDLEY, L. J. I am of the same opinion, and were it not that all cases of this kind are of the greatest importance, I do not know that I should consider it necessary to say anything, but when we have to decide which of two innocent people is to suffer from the fraud of a third it is necessary to be very careful and to take great pains to assure ourselves that the party against whom we decide is, according to law, in the wrong.

First of all, let me dispose of the questions as to American law. As I understand the evidence given by the American lawyers, if this transaction had taken place in America the banks would have got a good title to these shares, subject possibly to the question about the documents not being properly attested. I doubt very much whether the American lawyers would have attached much importance to that, and I shall assume throughout my judgment that if this transaction had taken place in America the banks would have succeeded. Now, the American law is important up to a certain point, but not beyond that point. We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this, — Who is entitled to these certificates? Now the certificates have been dealt with by the executors in England, and the

certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that is to govern the case.¹ . . .

JACKSON v. TIERNAN.

SUPREME COURT OF LOUISIANA. 1840.

[Reported 15 Louisiana, 485.]

MARTIN, J.² This is an action to recover the sum of two thousand four hundred dollars, with six per cent interest per annum, according to the laws of Maryland, on an assignment, for a valuable consideration, by one Thomas H. Fletcher, to the plaintiff of this sum, to be paid by the defendants, from so much of the proceeds of a shipment of tobacco made to them by Fletcher, who was indebted to the plaintiff. The latter took this assignment without any other security, against a protested bill of exchange, for the same amount, on being shown the receipts of the agent of the defendants, that Fletcher owed them nothing, and that the consignment of tobacco had actually been made. The assignment was made on the 21st of May, 1819, at Nashville, and the defendants resided in Baltimore. . . .

The counsel for the plaintiff has shown that although the assignment of a debt would be disregarded by, or rather would not be enforced in the common law courts of the State of Maryland, which is the *locus solutionis*, yet the assignment even of a part of a debt would be enforced in the Courts of Chancery in that State: provided the debtor assented thereto; or an obligation, resulting from the assignment of a part of the debt may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. As, for example, the deposit of money in a bank; the proceeds of a crop sent by a planter to his commission merchant for sale; or those of a shipment of produce to a consignee or factor in Baltimore, Liverpool, or Havre, which is the present case. See the case of *Poydras v. Delamare et al.*, 13 La. Rep. 98; *Mandeville v. Welch*, 5 Wheat. 277. See also 2 Story's Eq. Jur. § 1044; 3 Swanst. Rep. 393; *Tiernan v. Jackson*, 5 Pet. 598.

The plaintiff had, therefore, an equitable right, on this assignment, in the State of Maryland. The courts of this State are bound to enforce equitable rights. These rights are to be tested by the *lex loci contractus*, though the remedy here must be sought according to our laws, to wit, the *lex fori*.

¹ See *Masury v. Arkansas Nat. Bank*, 87 Fed. 381, *ante*, p. 181. — ED.

² Part of the opinion only is given. — ED.

SECTION VII.

PERFORMANCE.

JACOBS v. CRÉDIT LYONNAIS.

COURT OF APPEAL. 1884.

[Reported 12 Queen's Bench Division, 589.]

BOWEN, L. J. The plaintiffs in this case are esparto merchants carrying on business in the city of London, and the defendants are a banking firm also carrying on business in the city.

By a contract made in London on the 6th of October, 1880, the defendants agreed to sell to the plaintiffs 20,000 tons of Algerian esparto, to be shipped from Algeria during the year 1881 by monthly deliveries on board ships or steamers to be provided by the plaintiffs, payment to be made by cash on arrival of the ship or steamer at her port of destination. The defendants delivered a portion of the esparto under the contract, but failed to deliver the remainder; and this action was brought by the plaintiffs for its non-delivery. The defendants in their statement of defence admitted the non-delivery complained of, but alleged that the insurrection in Algeria and the military operations connected with it had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance. The plaintiffs demurred to this defence on the ground that the contracts were governed by English law and not by the law of Algeria, and further alleged that the defendants or their agents could have procured and shipped esparto from other parts of Algeria where *force majeure* did not exist. The defendants to the latter allegation rejoined that the insurrection and military operations rendered it impossible to transport such esparto as last mentioned to the place fixed in the contract for approval by the plaintiffs of its quality before shipment, or to transport the same to the place fixed in the contract for shipment. To this rejoinder there was a further demurrer upon similar grounds. The Queen's Bench Division having given judgment upon both demurrers for the plaintiffs, the case now came before us upon appeal.

The question which we have in substance to consider is, whether non-performance of their agreement by the defendants can be excused on the ground that military operations in Algeria and the Algerian insurrection had rendered its performance impossible, and that such an excuse would have been recognized by the French Civil Code which prevails in Algeria, in conformity with the following section as translated from

the French: "There is no ground for any damages when by means of a superior force or an accident the obligor has been prevented from giving or doing that which he was bound to give or do, or has done that which he was not bound to do." The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *primâ facie* rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord Mansfield, "established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 258 (see *Peninsular and Oriental Steam Navigation Co. v. Shand*, 3 Moo. P. C. (N. S.) 291). This principle was explained by the Exchequer Chamber in the case of *Lloyd v. Guibert*, Law Rep. 1 Q. B. 122, as follows: "It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract." It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract

will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *primâ facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal. In the present case the contract was made in London between merchants carrying on their business in the city of London, and payment was to be made in London. Presumably, therefore, we should infer that this was an English contract and intended to be governed by English law; but it still remains to be considered whether anything in the contract itself or the nature of its stipulations displaces this *primâ facie* view either wholly or in part. Now it cannot be contended that the parties have in express terms provided that any portion of this contract is to be construed or applied otherwise than according to English law; but it was suggested by the appellants that such an intention ought to be inferred from certain provisions as to the collection of the esparto in Algeria and as to its shipment thence. The esparto was to be shipped by the Compagnie Franco-Algerienne, or their agents, from Arzew, or any other port with safe anchorage, by sailing ships or steamers during the year 1881. The quality of the esparto was to be finally approved by the plaintiffs' representatives at the works of the Compagnie Franco-Algerienne, at Ain-el-Hadjar, in Algeria, before being baled, and no claim respecting quality was to be allowed after the delivery of the bales at Arzew. The necessary ships or steamers were to be supplied by the plaintiffs, otherwise the esparto was to be warehoused by the Compagnie Franco-Algerienne at the plaintiffs' peril and risk. Insurance was to be effected by the

defendants for the invoice amount at selling price, and 2 per cent over in the United Kingdom on the usual conditions. Payment to be made by cash on arrival of the ship or steamer at port of destination. Finally the contract contained an arbitration clause, with a provision that it should be made a rule of the High Court of Judicature on the application of either of the contracting parties.

There is absolutely nothing in any part of this contract, as it appears to us, which can amount to an indication that it is in any way or in any part of it to be treated as anything except an English contract, unless it be the mere fact that the esparto is to be collected in Algeria, approved at the works of a French company in Algeria before shipment, and to be delivered on board ships of the plaintiffs at an Algerian port, after which it is to be at plaintiffs' risk. To hold that on this ground only the ordinary presumption is to be displaced, and that the parties must have meant some law other than the English to govern the construction of any portion of the contract as regards the liabilities of the contracting parties, would be to introduce a serious element of uncertainty into mercantile contracts. The mere fact that a contract of this description, — made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port, — is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law, and with all the incidents which English law attaches to the non-performance of such contracts.

Now one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one), a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*.

"The rule laid down in the case of *Paradine v. Jane*, Ayleyn, 27, has often," says Lord Ellenborough, "been recognized in courts of law as a sound one; that when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract." *Atkinson v. Ritchie*, 10 East, 530, at p. 533. See also *Spence v. Chodwick*, 10 Q. B. 530; *Lloyd v. Guibert*, Law Rep. 1 Q. B. 121. If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see *Barker v. Hodgson*, 3 M. & S. 267; *Sjoerds v. Luscombe*, 16 East, 201. The Solicitor-General, in his argument, admitted that he was driven to contend that the law of the place of fulfilment not merely governed the mode of performance of this particular contract,

but governed also the obligations in respect of performance, and the liabilities in respect of non-performance of it. It seems to us, however, that the true principles of construction to be applied do not admit of this interpretation of this contract. To what extent foreign law is to be incorporated in any contract must be, as we have said, a question of construction of the contract itself read by the light of the surrounding circumstances. If a contract made in England by English subjects or residents, and upon which payment is to be made in England, has to be performed in part abroad, it might not be unreasonable to assume that the mode in which any part of it has to be performed abroad was intended to be in accordance with the law of the foreign country, and to construe the contract as incorporating silently to that extent all provisions of a foreign law which would regulate the method of performance, and which were not inconsistent with the English contract. But it cannot be gathered from such a contract as the present that the parties desired to go further and to discharge the defendants from performance whenever circumstances arose which would, according to foreign law, excuse them. The contract has absolutely provided that delivery of the esparto shall be duly made, not that the bargain as to such delivery need only be observed when the foreign law would insist upon such observance. The contract being an English contract, only such portions of the French Civil Code can be applied to its provisions as to performance in Algeria as are not inconsistent with the express language of the contract as interpreted according to English law. If the parties had wished, in addition to this, to incorporate a provision of French law which in the event of *vis major* would operate to excuse the contracting parties for non-performance, and thus to vary the natural construction of the instrument according to English law, they should have done so in express terms. Read by English law the contract is not susceptible of such an interpretation, and there is nothing to show that in this respect the parties desired the contract to be governed by the French.

For these reasons we are of opinion that the judgment of the court below was right and must be affirmed with costs.

Judgment affirmed.

COX v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1832.

[Reported 6 Peters, 172.]

ERROR to the District Court of the United States for the Eastern District of Louisiana. This was an action against Cox and Dick, sureties on the official bond of one Hawkins, late navy agent of the United States, who died without accounting for large sums of money officially received by him. The District Court gave judgment for the United States.¹

THOMPSON, J. It is deemed unnecessary to notice the numerous and palpable errors contained in this record: that which arises from the entry of the judgment is insuperable. It is difficult to conceive, unless through mistake, how such a judgment could be entered. The demand in the petition is only fifteen thousand five hundred and fifty-three dollars and eighteen cents. The verdict of the jury is twenty thousand dollars; and upon this a judgment is entered up against the estate of John Dick and Nathaniel Cox jointly and severally for twenty thousand dollars and a judgment also against Nathaniel Dick and James Dick, for ten thousand dollars each. Upon no possible grounds, therefore, can this judgment be sustained.

There are, however, one or two questions arising upon this record, which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice. . . .

The proceedings in this cause, and the manner in which the judgment is entered, have been considered at the bar as affording a proper occasion for the court to decide whether this contract, and the liability of the parties thereupon, are to be governed by the rules of the civil law which prevail in Louisiana, or by the common law which prevails here.

It was contended on the part of the plaintiffs in error, that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the sum due, according to the law of Louisiana; considering it a contract made there, and to be governed in this respect by the law of the State.

On the part of the United States it is claimed that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole; and that the contribution between the co-sureties is a matter with which the United States have no concern.

The general rule on this subject is well settled; that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the par-

¹ This short statement is substituted for that of the Reporter. Part of the opinion is omitted. — Ed.

ties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed. 2 Burr. 1077; 4 Term, 182; 7 Term, 242; 2 Johns. 241; 4 Johns. 285.

There is nothing appearing on the face of this bond indicating the place of its execution, nor is there any evidence in the case showing that fact. In the absence of all proof on that point, it being an official bond taken in pursuance of an Act of Congress, it might well be assumed as having been executed at the seat of government. But it is most likely that in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly as the sufficiency of the sureties is approved by the district attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department at the seat of government; and the navy agent is bound by the very terms of the bond to pay over such sum as may be found due to the United States on such settlement; and such paying over must be to the treasury department, or in such manner as shall be directed by the secretary. The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the city of Washington; and the liability of the parties must be governed by the rules of the common law.

The judgment of the court below is reversed, and the cause sent back with directions to issue a *venire de novo*.

HEALY v. GORMAN.

SUPREME COURT, NEW JERSEY. 1836.

[Reported 15 New Jersey Law, 328.]

THIS was an action of assumpsit on a promissory note dated in the city of New York, and payable at the State Bank in Elizabethtown, New Jersey. The CHIEF JUSTICE, on the trial at the Circuit, directed the jury to allow interest, at the rate of seven per cent, being the legal interest of the State of New York, where the plaintiff lived, and the contract was made. It was agreed by the counsel of the parties, that this question of the rate of interest should be moved, and argued at the

bar of the court, and if the direction of the CHIEF JUSTICE should be found wrong, then that the excess of interest should be deducted, and judgment be entered for the residue.

HORNBLOWER, C. J. I am satisfied that I was wrong in directing the jury to allow interest at the rate of seven per cent, the legal interest in the State of New York, instead of New Jersey interest, which is only six per cent.

Mr. Justice Story in his commentaries on conflicting laws, 241, § 291, says, "the general rule is, that interest is to be paid on contracts, according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid." In support of this rule the commentator refers to a great number of cases, both American and English.

Chancellor Kent in his commentaries (§ 39, p. 460, 461, 2d ed.), says: "The law of the place where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another State, unless there be circumstances to show that the parties had in view the law of the latter place in respect of interest; when that is the case, the rate of interest of the place of payment is to govern."

The note in question, though made in the City of New York, was in express terms to be paid at the Bank of Elizabeth, in this State. The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this State tacitly annexes an obligation thenceforth to pay interest until the debt is liquidated. But the obligation to pay interest was no part of the contract; for if the contract had been performed, no interest could have been demanded. It may be said, however, that it was; and that the understanding of the parties, and therefore in legal contemplation, a part of the New York contract, that if the money was not paid at maturity, it should then carry interest till paid. But the liability to pay interest in such case is rather a legal consequence than a conventional duty. The contract itself was for payment at a day certain. It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event, but left the law to take its course in case of a breach of the contract. Since, therefore, the event which gave rise to and legalizes the plaintiff's claim to interest happened in this State, or in other words, since it was here that the right to interest accrued, and by operation of our law that it becomes payable, the rate of interest must be such as is allowed in this State. (See Story on Conflicting Laws, fol. 245, §§ 294, 295.) The excess of interest must therefore be deducted, and judgment entered for the residue, pursuant to the agreement of the parties entered into at the Circuit.

FORD, J., and RYERSON, J., concurred.

Judgment for six per cent interest.

TARBOX v. CHILDS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1896.

[Reported 165 Massachusetts, 408.]

CONTRACT, to recover a balance of the purchase price for horses sold by the plaintiff to the defendants. Answer, payment. Trial in the Superior Court, without a jury, before BLODGETT, J., who reported the case for the determination of this court, in substance as follows.

The following facts were agreed. In May, 1893, the plaintiff, at Fredonia, in the State of New York, sold to the defendant Childs certain horses, and promised to deliver the horses at Fredonia. The defendant agreed to pay to the plaintiff one thousand dollars in cash at Fredonia, upon the delivery of the horses. The plaintiff forthwith delivered the horses to the defendant at Fredonia, but the defendant did not, at the time of delivery, pay anything towards the purchase price agreed upon. A few days later, the defendant sent by mail from Boston to the plaintiff at Fredonia \$675 in cash, to be applied on the purchase price. A few months later, the defendant sent to the plaintiff by mail from Boston to Fredonia his promissory note for \$325, payable at Boston in three months from date.

There was no agreement or understanding at any time between the parties as to whether that note or the renewal notes hereinafter mentioned should be accepted by the plaintiff in payment of the balance due or not, except such, if any, as can be implied from the facts herein set forth. When the first note became due, the defendant renewed it by another, which was the same as the first in all terms except the date. This renewal note was also sent by mail from Boston to Fredonia, and with it was sent a cash payment of the interest due on the first note to the date of maturity thereof. The plaintiff returned the first note, on request of the defendant, and retained the second note and the payment of interest.

No part of the principal thereof has ever been paid, nor any interest thereon. The plaintiff brought into court and tendered to the defendant the protested note, which tender was refused.

The agreed facts were the only evidence at the trial, with evidence of the law of the State of New York so far as the same was applicable to those facts.

The defendant Childs, who alone defended, objected to the admission of evidence of the law of New York, and requested the judge to rule that the effect of the delivery and receipt of the notes set forth in the agreed facts was to be determined solely by the law of this Commonwealth; and further requested the judge to rule as follows:—

“1. The question whether the first note is to be presumed to have been given in payment of the pre-existing debt or not is a question to be determined according to the laws of Massachusetts.

"2. Upon the agreed facts and the pleadings, it is to be presumed that the first note was given by the defendant and received by the plaintiff in payment and satisfaction of the pre-existing debt due the plaintiff for the purchase price of the horses.

"3. Upon all the evidence, the plaintiff is not entitled to recover.

"4. Upon all the evidence, it is to be presumed that the second note was given by the defendant and received by the plaintiff in payment of the first note."

The judge refused to give any of the rulings requested, and found for the plaintiff.¹

ALLEN, J. The defendant Childs contends that the notes given to the plaintiff were Massachusetts contracts, and that they should be interpreted and have effect according to the law of Massachusetts. That would be so if a question arose in an action upon the notes, or either of them. *Shoe & Leather National Bank v. Wood*, 142 Mass. 563. But the present action is brought on the original contract, and not on either of the notes. The plaintiff seeks to recover what the defendants agreed to pay him as the price of the horses sold. The defendants' promise was made in New York, and was to be performed there. They were bound to make payment in that State, and the question is whether they have done so. They paid a part in cash, and for the residue they sent by mail from Massachusetts to the plaintiff in New York their note made in Massachusetts and payable here. By the law of Massachusetts a negotiable note taken for an antecedent debt is deemed to be a payment, unless there is something to show a contrary intention. The rule in New York is the other way. The plaintiff in New York was not affected by the rule which prevails here. The defendant's promise to pay him in that State remained unperformed and undischarged, according to the law of that State. It makes no difference that successive notes were given. The plaintiff was to be paid there, and he has not yet been paid according to the law of New York, and is entitled to recover. *Vancleef v. Therasson*, 3 Pick. 12; *Rosseau v. Cull*, 14 Vt. 83; *Winsted Bank v. Webb*, 39 N. Y. 325; *Olcott v. Rathbone*, 5 Wend. 490. Story, *Conf. of Laws*, § 332.

*Judgment for the plaintiff.*²

¹ Part of the statement of facts is omitted. — Ed.

² Where a note is given in payment at the place where the original debt was contracted and is payable, the question whether it is to be taken as a discharge of the original debt is of course to be determined by the law of the place. This is commonly said to be governed by that law because the note was there accepted as payment. *Bartsch v. Atwater*, 1 Conn. 409; *Thompson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137; *Gilman v. Stevens*, 63 N. H. 342. — Ed.

STEBBINS v. LEOWOLF.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1849.

[Reported 3 Cushing, 137.]

THIS was an action of assumpsit, — the declaration containing the common money counts, — brought by the plaintiffs, who were brokers in the city of New York, to recover of the defendant, also of New York, the sum of \$1,512.03, and interest, for commissions and differences, on the purchase and sale of certain stocks, made by the plaintiffs under the order and for the account of the defendant.¹

Dewey, J. . . . Another ruling, to which an exception was taken, at the trial, was, “that if the contract for a portion of the shares matured on Sunday, the vendee had the whole of the Monday following in which to perform his contract; and that as to the shares purchased on the 1st of December, 1841, they having been purchased on a credit of sixty days, and the last of the sixty days falling on Sunday, the present action was prematurely commenced on the following Monday.” This applies to only a portion of the shares embraced in the contracts of sale, but is deemed important, inasmuch as it is said to apply to all those shares which, in the view we have taken of the law, can be considered as so held and possessed by the vendors as to be the subject of a legal contract of sale and transfer at a future day.

This contract was entered into in the State of New York, was made by parties resident there, and to be performed there, and is therefore peculiarly to be governed by the rules of law of that State.

There has not been an entire uniformity in the various judicial tribunals, in their decisions, as to the time of performance of a contract, when the day of maturity on the face of the contract falls on a Sunday. But it is enough for the present purpose, that the law of the State of New York, upon this point, has become well settled. In the case of *Salter v. Burt*, 20 Wend. 205, it was held, that “when the day of the performance of contracts other than instruments upon which days of grace are allowed, falls on Sunday, that day is not counted, and a compliance with the stipulation of the contract on the next day (Monday) is deemed in law a performance.” Such seems to be the rule of law in New York as to contracts. As to the computation of time, when a statute declares that an act shall be done within a certain number of days, and the last of these days falls on a Sunday, a different rule has prevailed. *Ex parte Dodge*, 7 Cow. 147. The case of *Alderman v. Phelps*, 15 Mass. 225, is to the same effect. As to so much of the claim of the plaintiffs as has its foundation in the contract made on the 1st of December, 1841, this action was prematurely brought, and for that reason, if for no other, the plaintiffs cannot recover for money paid on that contract.

¹ The statement of facts and part of the opinion are omitted. — Ed.

BENNETT v. CLEMENS.

SUPREME COURT OF PENNSYLVANIA. 1868.

[Reported 58 Pennsylvania, 24.]

THIS was an amicable action of assumpsit to December Term, 1866, in which John Clemens was plaintiff and Isaac R. Benners, survivor of the firm of Isaac R. Benners & Co., defendant. The claim was for a balance due by defendant on an invoice of fruit, contracted for in England and shipped to defendant to New York. The whole amount of the shipment was \$2,967.85, which was reduced to \$896.95 by quercitron bark shipped to plaintiff. The plaintiff claimed to recover this balance at gold prices with interest from December 17th, 1863. The only question in the case was whether it was to be paid on that basis.¹

The verdict was for \$1,456.65, the whole amount of the plaintiff's claim. The defendant took a writ of error.

THOMPSON, C. J. The debt sued for was a debt contracted in England, or rather the balance of a debt contracted and partially liquidated there by returns in quercitron bark. In the absence of any understanding to the contrary the balance was due and payable there. This being so, it was payable in the legal currency of the country, denominated pounds, shillings, and pence, and the representative of gold. Of course, as any payment obtained here would be payable in legal tender notes, the value of the gold in legal tenders, with interest, would be what in amount the judgment should be. The *lex loci contractus* must control in interpreting the contract. *Allshouse v. Ramsay*, 6 Whart. 331; *Watson v. Brewster*, 1 Barr, 381, and authorities cited by the defendant in error. This view of the case is sufficient to affirm the judgment without reference to any question arising on our Legal Tender Acts. *The judgment being right in amount is affirmed.*²

GRAHAM v. FIRST NATIONAL BANK.

COURT OF APPEALS, NEW YORK. 1881.

[Reported 84 New York, 393.]

FINCH, J.³ The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank, in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase price was paid by her or by her husband, and notwithstanding

¹ Part of the statement of facts and arguments of counsel are omitted. — ED.

² *Acc. Grunwald v. Freese* (Cal.), 34 Pac. 73; *Comstock v. Smith*, 20 Mich. 338; 8 Clunet, 447 (Brescia, 4 Nov. '78); 8 Clunet, 448 (Florence, 21 May, '70); 23 Clunet, 597 (Marseilles, 25 June, '95). — ED.

³ Part of the opinion only is given. — ED.

the evident control of it, for his own purposes, by the latter. No creditors of the husband intervene to affect the question, and, as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and, assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions: whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether, by such payment to him, the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. . . . While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law, however, remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the State of Virginia. It is proved that in that State the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that State, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied, however, that the law of Virginia applies, and it is argued that the law of Maryland, the *lex domicilii*, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicile and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. Story on Conflict of Laws, § 374 *et seq.*; Wharton, § 393 *et seq.* Whatever is useful in the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow where, at least, they are in harmony with the ruling of our own tribunals. It must, then, be granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so, present at his domicile, whatever their actual situation may be. The law of the domicile, therefore, naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by which it is to be justified. When, however, the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicile, and busies itself with the inherent character of the property, and of the contracts which both create and constitute

it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature, and effect of a contract are to be determined by the *lex loci contractus*. Story on Conflict of Laws, § 321. But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, *jure mariti*. On the one hand, it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicile, and utterly unaffected by the foreign law, and the former must, therefore, dictate and measure the authority and power of the husband and the right of the wife. That is, in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another State, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company, declaring dividends in this State, should be bound to pay stockholders in other States according to the foreign laws, and in accordance with different and varying codes. Observing the evil result, we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicile, and the actual fact may be otherwise. Judge Comstock, in *Hoyt v. The Commissioners of Taxes* (23 N. Y. 228), well says, "that the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And Judge Story says that the legal fiction "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." Conflict of Laws, § 550. And hence has been very steadily sustained the general rule that a contract made in one State, and to be performed there, is governed by the law of that State, and the further rule, which is a logical result, that a defence or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. Story on Conflict of Laws, § 331; *Thompson v. Ketcham*, 8 Johns. 189; *Bartsch v. Atwater*, 1 Conn. 409; *Smith v. Smith*, 2 Johns. 285; *Hicks v. Brown*, 12 Johns. 142; *Sherrill v. Hopkins*, 1 Cow. 103; *Peck v. Hibbard*, 26 Vt. 702; *Bowen v. Newell*, 13 N. Y. 290; *Cutler v. Wright*, 22 N. Y. 472; *Waldron v. Ritchings*, 3 Daly, 288; *Jewell v. Wright*, 30 N. Y. 259; *Willitts v. Waite*, 25

N. Y. 577. In these cases the fiction yields to the fact; the situs attached theoretically to the person of the owner, and, therefore, to his domicile surrenders to the actual situs where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual situs controls, and the fiction which carries the personal property to the domicile of the owner is disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the *lex loci* is applied. The defence of infancy is to be sustained or denied according to the rule of the place of contract and performance. So, also, as to the disability of coverture, and the rate and legality of interest. And even an assignment, *in invitum*, compelled by the local law, will transfer property in another State where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their application by the influence of varied circumstances, but concur in the general principle upon which the *lex loci* has been applied. The point pressed here is that while it controls the construction and validity of the contract, it does not settle the capacity of the non-resident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may affect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign States, that the true rule is that "the capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere, the *lex loci contractus* will govern in respect to capacity and condition. We cannot make, therefore, the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was, therefore, valid and effectual, and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purposes of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defence to the action.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

THE QUEEN v. OGILVIE.

EXCHEQUER COURT OF CANADA. 1897.

[Reported 6 *Canada Exchequer*, 21.]

DAVIDSON, J.¹ The Crown by information, dated September, 1895, prayed judgment for \$77,337.03 as balance due under a letter of guarantee signed by defendant on the 11th of May, 1883. At the trial the claim was reduced to \$65,820.88. The defendant pleads that he stands wholly discharged by payments made by the principal debtor subsequent to, and imputable in extinction of, his suretyship.

Financial difficulties, which ultimately resulted in liquidation, compelled the Exchange Bank of Canada to apply to the Finance Department of Canada for assistance. This was granted on three several occasions, in the hope of saving the institution from insolvency. On the 12th of April, the 21st of April, and the 12th of May the Government made deposits of \$100,000 each, and in acknowledgment thereof were delivered receipts bearing the numbers 323,329 and 346. . . .

The third deposit . . . was . . . made, upon the Department being placed in possession of the following letter from defendant, who was at the time one of the directors of the bank : —

“ OTTAWA, 11th May, 1883.

“ MY DEAR SIR, — I beg that the Government will place a further sum of \$100,000 at deposit with the Exchange Bank on the same terms as the former deposits of \$200,000, and on the Government agreeing to comply with the request I hereby undertake to hold myself personally responsible for the further deposit of \$100,000.

“ Yours very truly,

“ A. W. OGILVIE.

“ J. M. COURTNEY,

“ *Deputy Minister Finance.*”

The check covering this deposit, for which a receipt bearing the number 346 issued, was delivered to defendant and by him brought to Montreal. Verbal evidence was made at the trial to the effect that it was an express condition and agreement precedent to the check being delivered over to the bank authorities, that all future payments to the Government should be first applied in extinction of the amount for which the defendant had thus become surety. . . .

Later, the deputy minister wrote as follows : —

“ FINANCE DEPARTMENT, OTTAWA, 7th July, 1883.

“ SIR, — Referring to previous correspondence, I have now the honor to request that you will be good enough to forward to me (at your very earliest convenience) a receipt for the \$50,000 which was to

¹ Part of the opinion only is given. — Ed.

be turned into cash on the 1st instant, and also a fresh receipt for \$50,000 at interest and I will return you one of the receipts for \$100,000 which we now hold. Pray attend to this without delay.

"I have, etc.,

"J. M. COURTNEY,
" *Deputy Minister Finance.*

"THOS. CRAIG, Esq.,
" *Managing Director Exchange Bank, Montreal.*"

Much, if not the whole of the controversy existing between the parties, results from the terms in which answer was made on behalf of the bank. These are its words:—

"EXCHANGE BANK OF CANADA, MONTREAL, 9th July, 1883.

" *The Deputy Minister of Finance, Ottawa.*

"DEAR SIR,—As requested in your letter of the 7th instant, I now forward the deposit receipt of this bank, No. 358, in favor of the Hon. the Receiver-General for \$50,000, and enclose our receipt for \$50,000, placed to the credit of the Finance Department account. Please return deposit receipt No. 323, \$100,000, now in your possession, and oblige.

"Yours, etc.,

"JAMES M. CRAIG,
" *Pro Manager.*"

James M. Craig was the accountant of the bank. It will be remembered that No. 323 was the earliest in date of the three receipts held by the Government. It was returned to the bank, as requested. . . .

Aware of the payment of \$100,000 and in the apparent belief that his liability had been discharged, defendant pressed the bank for the return of his letter of guarantee. So on the 10th of November, the president wrote to Mr. Courtney in these terms:—

"Concerning the loans we obtained from you last spring for the last \$100,000 which you gave us, you obtained from Mr. Ogilvie his guarantee for the payment of the \$100,000. As we paid you this last amount, and the deposit receipts have been returned to us, I will be obliged to you if you will kindly return to me Mr. Ogilvie's guarantee letter." . . .

Mr. Courtney took the opinion of the Department of Justice and refused to return the letter of guarantee. The present action was only entered twelve years later. The bank suspended payment on the 17th of September, 1883. . . .

The defendant . . . contends that any amount in which he was ever responsible towards Her Majesty has been paid; that the sums received on her behalf ought to have been imputed on the sum of \$100,000, in connection with which he gave his guarantee; that James M. Craig in asking for the return of the first receipt, No. 323, in connection with the repayment of \$100,000 acted in contravention of the agreement between the bank and the defendant, in error, and without the knowl-

edge of and contrary to the instructions of his employers; that the claim is prescribed.

The plea of prescription was not seriously argued at the trial. Prescription has not inured.

English and French authorities were cited at the Bar, on either side, in sustainment of the legal principles relating to imputations or appropriation of payments and to other features of the case which it was desired to uphold.

In case of conflict, which is to prevail as to the issues before me — the law of Ontario or of this province? The common or the civil law? The question needs a definite reply, because defendant signed and delivered his letter to Mr. Courtney, at Ottawa, and there received in return the check for \$100,000. But the place of the bank's applications, of the payment of the Government checks, of the deposits, of the giving of the receipts and of the repayments, was Montreal. When a contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, is the law of the country where the performance is to take place (Dicey, *Conflict of Laws*, 570). I must therefore give dominant weight to the law of suretyship as it exists in this province. . . .

Whether it is held that the specific imputation in favor of the surety, which was intended by the bank, ought to replace the unauthorized and mistaken acts of James Craig, or that the plaintiff and defendant are to be left to the application of legal imputation, makes no difference as to results. For if neither party made election as to the specific debt on which the payments were to be applied, they would go in discharge of the one which was the most onerous. The civil law deems that debt to be most onerous to which a suretyship is attached, for the reason that the debtor by one payment discharges two creditors representing principal and accessory obligations. Ponsot, *Cautionnement*, no. 343; 17 Laurent, no. 619; Roll. de Vill. vo. *Imputation*, v. 5, p. 170, no. 33; Pothier, *Obligations*, no. 580. . . .

*Judgment for defendant, with costs.*¹

¹ Reversed on the facts, without dissenting from the statements of law, 29 Can. 299. — Ed.

SECTION VIII.

DISCHARGE.

GIBBS v. SOCIÉTÉ INDUSTRIELLE.

COURT OF APPEAL. 1890.

[Reported 25 Queen's Bench Division, 399.]

LORD ESHER, M.R.¹ In this case the defendants, a French company, entered into negotiations for the purchase of copper through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by

¹ Part of this opinion only is given. Concurring opinions were delivered by LINDLEY and LOPES, L.JJ. — ED.

such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the

country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith v. Buchanan*, 1 East, 6, it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicile is altogether outside the general principle that governs such matters, and cannot be supported.¹

¹ *Acc. Blanchard v. Russell*, 13 Mass. 1; *May v. Breed*, 7 Cush. 15; *Smith v. Smith*, 2 Johns. 235. — Ed.

FELCH v. BUGBEE.

SUPREME JUDICIAL COURT OF MAINE. 1859.

[*Reported 48 Maine, 9.*]

KENT, J.¹ The questions between the plaintiff and the principal defendants relate to the effect of a discharge in insolvency, granted to the defendants by the proper tribunal under the laws of Massachusetts. It appears from inspection of the papers that the discharge was regularly granted, and, by its terms, includes the contract as set forth in each of the notes in suit. The question arises, whether such a discharge is effectual to bar this action.

Both notes were made in Boston, payable to defendants' own order, signed and indorsed by them to citizens of Massachusetts, who, at Boston, negotiated and sold them to the plaintiff, before maturity, and before the commencement of proceedings in insolvency. The first of these notes contains no specification of any place of payment; the second is payable at any bank in Boston. . . .

The second note . . . is made payable at any bank in Boston; and it is contended that this stipulation takes the case out of the principles of the former decisions, and makes it subject to the discharge offered in evidence; and that a contract, although with a citizen of another State, is barred if it is payable in the State where the debtor resides and has obtained his discharge.

The other questions being disposed of, the only remaining one is, whether the fact that the note is made payable in Massachusetts gives efficacy to the discharge, although the contract is with a citizen of another State.

We will first consider the authorities bearing on this precise point.

In *Scribner v. Fisher*, 2 Gray, 43, a majority of the court in Massachusetts decided that such a note is barred by a discharge in insolvency in that State. This decision has been reaffirmed in several cases decided subsequently in that court. 5 Gray, 539, and note. No reasons are assigned in the subsequent cases. They rest on the case of *Scribner v. Fisher*, in which Metcalf, J., gave a dissenting opinion. But this is now established as the doctrine of that court.

In the case of *Demerit v. Exchange Bank* (Law Reporter, March, 1858), Judge Curtis held, "that it is not competent for the State of Maine, under the Constitution of the United States, to pass any law discharging or suspending the right of action on a contract made with a citizen of another State by a citizen of Maine. This was settled in *Ogden v. Saunders*, 12 Wheat. 213, and *Boyle v. Zacharie*, 6 Pet. 348." "It is urged," says Judge Curtis, "that where the contract is to be performed in the State, it is not within *Ogden v. Saunders*. It

¹ Part of the opinion only is given. — ED.

has been so held in *Scribner v. Fisher*, 2 Gray, 43. But I cannot concur in that opinion. I consider the settled rule to be that a State law cannot discharge or suspend the obligation of a contract, though made and to be performed within the State, when it is a contract with a citizen of another State. Such was Justice Story's understanding of the decisions of the Supreme Court of the United States in which he took part. *Springer v. Foster*, 2 Story, 387."

Mr. Justice Story has also expressed the same view of the law in his elementary works. In his *Conflict of Laws*, § 341, he says, "that a discharge under any law of the State where made will not operate to discharge any contracts except such as are made between citizens of the same State." *Very v. McHenry*, 29 Maine, 214.

The Court of Appeals in New York, in 1852, in the case of *Donnelly v. Corbett*, 3 Seld. 500, had this precise question before them,—the contract being payable in South Carolina, where the debtor resided and was discharged,—the creditor being of New York. The court held that an action on the contract was not barred by a discharge. The ground of the decision was, that a discharge, under a State insolvent law, of a debtor from his debts contracted after its passage, is valid as respects contracts between citizens of the State, but invalid as to all contracts where a citizen of another State is a party. The same doctrine is found in *Poe v. Duck*, 5 Md. Rep. 1.

In *Anderson v. Wheeler*, 25 Conn. 613, the case presented the same question as the one before us,—the original parties to the note were both of New York, it was indorsed before due to a citizen of Connecticut, it was payable at a bank in New York, where the payee obtained his discharge in insolvency. The court refers to the case of *Scribner v. Fisher*, but dissents from it, and decides that the fact of the place of payment being designated does not take it out of the rule as laid down in Judge Johnson's opinion, concurred in by a majority of the court, in *Ogden v. Saunders*.

We have also the opinion of Mr. Justice Baldwin of the Supreme Court of the United States, in the case of *Woodhull v. Davis*, Baldwin's Rep. 300. His decision is based on the position that bankrupt or insolvent laws can have no extraterritorial effect on persons beyond the limits of the State or nation.

The decisions which are in opposition to the cases in Massachusetts rest upon the understanding of the doctrine in the original case of *Ogden v. Saunders*. All the courts, including that of Massachusetts, state and national, agree, as a starting-point, that whatever is clearly and expressly decided in that case is to be taken as settled, although the reasoning may not be entirely satisfactory. That case, indeed, resembles the works of some ancient authors, where the commentaries, and doubts, and explanations outrun the text and overwhelm it, leaving the bewildered student "in wandering mazes lost,"—ofttimes the "interpreter being the harder to be understood of the two."

Mr. Justice Woodbury, in the case of *Town v. Smith*, 1 Wood. &

Minot, 137, discusses fully the authorities bearing on the whole question, and, although doubting some of the views, and the soundness of the reasoning on which they are based, yet feels bound by the authority of the cases in the Supreme Court of the United States, which he understands as establishing the test of citizenship of the parties.

The discussions and decisions, have, however, resulted in bringing about a general agreement as to all the points first enumerated, leaving this single point of the place of performance yet, in a measure, in controversy.

The Supreme Court of the United States was called upon to revise and interpret the leading case of *Ogden v. Saunders*, and the judges gave their opinions on the various questions raised, in *Cook v. Moffat*, 5 How, 309. Whilst there is an almost painful difference of opinion on the question of the soundness of the grounds assumed or reasons assigned, the court concurs in fixing certain principles as finally established. The one bearing on the exact point before us is thus stated: "A certificate of discharge under an insolvent law will not bar an action brought by a citizen of another State, on a contract with him."

This is the state of the authorities on the subject. The preponderance seems clearly against giving efficiency to the discharge in a case like this.

If we leave the authorities and seek beyond them for the reasons on which any rule on this subject is founded, we find two trains of argument, which, starting from different premises, lead to directly opposite results. The whole controversy on this point seems to turn upon the question whether it is the contract itself, including the place of making and of performance, and the *lex loci contractus*, that is to govern, or whether the citizenship of the contracting parties controls, without reference to the nature or place of making or performance of the contract.

It is urged by those who favor the first view, that, when a foreigner, or a citizen of one State, voluntarily comes into another State, and there makes a contract with a citizen of the latter State, not by its terms to be performed elsewhere, the *lex loci* attaches to the contract, and must not only govern its construction, but its validity, and the grounds or facts by which it may be discharged. The argument is, that every contract made has relation to the existing law of the State, and (to apply the doctrine directly to the case before us) that, when such a contract is made within the territorial jurisdiction of Massachusetts, the liability to a discharge under the existing insolvent laws becomes a part and parcel of that contract, incorporated into it, or attached to it, as a condition or limitation, and goes with it everywhere, whoever makes or becomes a party to it, at any time. In this view, citizenship is of no consequence. The ground on which insolvent laws of a State, which allow a full discharge of a contract, are sustained against the objection that they impair the obligation of contracts, and thus violate the provision of the United States Constitution, is that above stated, viz.: that the liability to such discharge is either

expressly or tacitly understood by the parties, as a part of, or a fixed attendant upon, all contracts made under the overshadowing canopy of the statute of insolvency; and that any citizen of another State, who comes voluntarily within the territory thus embraced, must be held to contract with reference to the law, and that the enforcement of it would not violate his rights.

If this were a new question, this view of the case would certainly be entitled to great consideration. It will, however, be observed, that the strength of this argument rests upon the doctrine of the *lex loci contractus*, the place of *making* the contract, not the place of *performance* only or chiefly. It is the fact of making a contract on a territory governed by a certain law that incorporates the law into it, if it is thus incorporated. And it would seem, that if it is not citizenship, but place, that is to control, those who favor this view should have taken their stand upon the ground that every contract made in the State, and not expressly to be performed elsewhere, must be governed by the existing law. But this has been given up by all the courts. Even the court in Massachusetts admits that the fact that the contract was made in that State cannot bar recovery, after a discharge in insolvency. The place of making is treated as immaterial. *Dinsmore v. Bradley*, 5 Gray, 487; *Houghton v. Maynard*, 5 Gray, 552; 10 Met. 694, and numerous other cases. The same court has decided that a contract made in Georgia, and there to be performed, between two citizens of Massachusetts, would be barred by a discharge in Massachusetts. *Marsh v. Putnam*, 3 Gray.

The question naturally arises, why the place of performance of a contract should subject it to the operation of a discharge, when the place of its formation would not. If the place of performance is material, and must control, it must be because the party out of the State voluntarily assented to the condition fixing the place, thereby bringing the contract under the law of the State. The same reasoning would apply to the making of a contract which might be performed in the State. When the fact of the place of making the contract is not regarded as essential, the citadel, as it seems to us, is surrendered, and it is vain to attempt to make a stand upon the place of performance alone.

It is conceded by the court in Massachusetts that the forum makes no difference; that the same rule applies everywhere. And, after a careful consideration of the reasonings and decisions of the court on this vexed subject, we can only say that, if the question were an open one in all respects, we might incline to the doctrine that the place of making and the place of performance should control, on the grounds before stated, rather than the fact of naked citizenship. Yet we are forced to the conclusion that a different rule has been finally established by the Supreme Court of the United States, and concurred in by most of the State courts, and we are not disposed to depart from the rule thus established. That rule is the one found in *Cook v. Moffat*, 5 How.

before cited. It rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extraterritorial force so as to act upon the rights of citizens of other States; and which holds that, as between citizens of the State, the discharge will bind them as to all posterior contracts, wherever made or wherever to be executed; and, as to citizens of other States, will not discharge any existing contract, although made or to be performed in the State granting the discharge. Or, as expressed by the court, the discharge is not a bar "when the action is brought by a citizen of another State." This rule is broad enough to exclude all questions arising from either the place of making or place of performance. It rests entirely on the citizenship of the parties, and treats all other matters as immaterial.

*The plaintiff must have judgment on both notes.*¹

PHOENIX NATIONAL BANK v. BATCHELLER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[Reported 151 *Massachusetts*, 589.]

HOLMES, J. This is an action by a Rhode Island national bank, upon a promissory note payable in Massachusetts, and made here by the defendants, citizens of this State. The defence is a discharge in insolvency in this State. It is admitted that the plaintiff did not prove its claim upon the note, and the only question is whether, under these circumstances, the discharge is a bar. It was argued for the defendants, that the decisions of the Supreme Court of the United States that discharges in such cases are not generally valid against citizens of other States do not go upon any constitutional ground, but upon mistaken views of what is called private international law, and therefore are not binding upon us; and we were asked to reconsider *Kelley v. Drury*, 9 Allen, 27, in which this court yielded its earlier expressed opinion, and followed the precedent of *Baldwin v. Hale*, 1 Wall. 223. See also *Guernsey v. Wood*, 130 Mass. 503; *Maxwell v. Cochran*, 136 Mass. 73.

There is no dispute that the letter of the discharge and of our statute covers the plaintiff's claim; Pub. Sts. c. 157, §§ 80, 81; and the argument in favor of giving them effect according to their letter is, that unless the statute is void we are bound to follow it; that the law of the

¹ Acc. *Baldwin v. Hale*, 1 Wall. 223; *Rhodes v. Borden*, 67 Cal. 7, 6 Pac. 851; *Anderson v. Wheeler*, 25 Conn. 603; *Hawley v. Hunt*, 27 Ia. 303; *Newmarket Bank v. Butler*, 45 N. H. 236; *Phelps v. Borland*, 103 N. Y. 406; *Main v. Messner*, 17 Or. 78, 20 Pac. 255; *Roberts v. Atherton*, 60 Vt. 563, 15 Atl. 160. — Ed.

place where the contract is made and is to be performed, which is in force at the time of making and for performing it, enters into the contract so far as to settle everywhere what acts done at that place shall discharge it (*May v. Breed*, 7 Cush. 15); and that a discharge in accordance with that law cannot be said to impair the obligation of a contract which contemplated it, or to deprive the contractee of property without due process of law when that property was created subject to destruction in that way.

We express no opinion upon the weight of this argument. Although it formerly prevailed with this court (*Scribner v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539), it may be that there is a distinction as to a discharge by legal proceedings. It may be that statutes providing for a discharge by an insolvency court do not enter into the contract in such a sense as to bind the contractee to adopt and submit himself to the jurisdiction as an implied condition of the promisor's undertaking. It does not follow, because the discharge, if effective, does not impair the obligation of the contract, that absolute liability to it is a part of the substantive obligation. The substantive promise and the obligation of the contract are different things; and apart from this consideration it may be that by sound principle the plaintiff is to be taken to have subjected itself to Massachusetts proceedings only to the extent that, if the Massachusetts courts could acquire jurisdiction over it in the ordinary modes by which jurisdiction of the person is acquired, it would be bound everywhere by a discharge granted here.

However this may be, we see no sufficient reason for departing from what has been accepted as the law for a quarter of a century. We agree that, consistently with our duty, we cannot yield our opinion upon new questions not subject to the final jurisdiction of the Supreme Court of the United States solely out of a desire for uniformity. But when we are asked to overrule a decision of our own court which has been acquiesced in for so long, we should have to be very sure, before doing so, not only that the decision was wrong, but also that the Supreme Court of the United States, whatever we may think about it, either would not regard our decision as subject to review by them, or would abandon opinions which they have expressed repeatedly, and down to the latest volume of their reports.

We should hesitate to overrule *Kelley v. Drury*, even if we were ready to say that we disagreed with the principle of *Baldwin v. Hale*, and that we thought our decision not subject to review. For when in a particular case the precedents are settled in favor of uniformity, the fact that they do conform to the decisions of the Supreme Court of the United States is a most powerful secondary reason for not disturbing them, and would be likely to outweigh our private opinions upon the original matter. There is, too, a particular reason for uniformity in the present case, because it is manifest that, practically at least, the general validity of the discharge, that is, its effect outside this Commonwealth, depends upon the decision of other courts than this, and

that the decision of the United States Court upon that question is of more importance than that of any other.

The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass. *Baldwin v. Hale*, 1 Wall. 223, 233; *Baldwin v. Bank of Newbury*, ib. 234; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489, 497; *Cole v. Cunningham*, 133 U. S. 107, 115. Whether that court would regard a decision to the contrary by a State court as subject to review by them upon constitutional grounds, does not appear very clearly from any language of theirs which has been called to our attention, unless it be the following, repeated in *Baldwin v. Hale*, 1 Wall. 223, 231, from *Ogden v. Saunders*, 12 Wheat. 213, 369: "But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States." This is somewhat emphasized as the deliberate view of the court, not only by its original mode of statement, but by their adhesion to it after the dissent of Chief Justice Taney in *Cook v. Moffat*, 5 How. 295, 310. See *Scribner v. Fisher*, 2 Gray, 43, 47.

This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 498); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer v. Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard v. Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley v. Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States.

The decision in *Kelley v. Drury* did not go upon any nice inquiry whether it was subject to review, but upon the ground that this court deferred to the decision of the Supreme Court of the United States, that discharges like the present were not binding outside the jurisdiction, and that, this being so, a discrimination should not be made in favor of our citizens in proceedings in the State court in distinction from proceedings in the courts of the United States.

This last proposition was conceded by the senior counsel for the defendant. But as some doubt was thrown upon it in the printed brief, we repeat what was again intimated in *Murphy v. Manning*, 134 Mass. 488, that there is nothing in the law affecting the question before us

which indicates an intent to refuse foreign creditors access to the courts of Massachusetts as a merely local rule of procedure, or otherwise than as a consequence of the substantive right having been barred by the discharge. The form of the discharge in the Pub. Sta. c. 157, § 80, and the language of § 81, address themselves directly to the substantive right, and declare the debtor discharged from the specified debts. It being settled that the plaintiff's debt is not barred, an action can be maintained to recover it in a State court.

*Judgment for the plaintiff.*¹

CANADA SOUTHERN RAILWAY v. GEBHARD.

SUPREME COURT OF THE UNITED STATES. 1883.

[*Reported 109 United States, 527.*]

SUTTS (commenced in the Supreme Court of the State of New York and removed to the Circuit Court of the United States for the Southern District of New York), by holders of mortgage bonds of the Canada Southern Railway Company, and of extension bonds, to recover on their extension bonds and on the interest coupons on their mortgage bonds. The following are the facts as stated by the court:

What is now known as the Canada Southern Railway Company was originally incorporated on the 28th February, 1868, by the legislature of the Province of Ontario, Canada, to build and operate a railroad in that province between the Detroit and Niagara rivers, and was given power to borrow money in the province or elsewhere and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining, and working the railway." Under this authority the company, on the 2d of January, 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to \$8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the city of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the company covering "the railway of said company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured.

Before the 31st of December, 1873, the company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund their coupons falling due January 1, 1874, July 1, 1874, and January 1, 1875, by converting them into new bonds payable on the 1st of

¹ *Acc. Farsira v. Keevil*, 18 Mo. 166. See *Chase v. Henry*, 166 Mass. 579. — Ed.

January, 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be cancelled until the new bonds were paid.

In this condition of affairs the Parliament of Canada, on the 26th of May, 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," for all the purposes mentioned in, and with all the franchises conferred by, the several incorporating acts of the legislature of the province. This, under the provisions of the British North America Act, 1867, passed by the Parliament of Great Britain "for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof," made the corporation a Dominion corporation, and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March, 1875, another series of bonds, amounting in the aggregate to \$2,044,000, or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the company found itself unable to pay its interest and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to the company and to the bondholders "a scheme of arrangement of the affairs of the company," which was approved at a meeting of the directors on the 28th of September, 1877. This scheme contemplated the issue of \$14,000,000 of thirty-year bonds, bearing three per cent interest for three years and five per cent thereafter, guaranteed, as to interest, for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1, 1878. These new bonds were to be secured by a first mortgage on the property of the company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December, 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of \$7,332,000 out of \$8,703,000; and by the holders of \$1,590,000 of the second series of bonds out of \$2,029,000 then outstanding. Upon the representation

of these facts to the Parliament of Canada, the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name on the 16th of April, 1878.

This statute, after reciting the scheme of arrangement, with the causes that led to it, and that it had been assented to by the holders of more than two-thirds of the shares of the capital stock of the company, and by the holders of more than three-fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock, and other plant" of the company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 was as follows:

"4. The scheme, subject to the conditions and provisos in this act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the company secured by the said recited indenture of the fifteenth day of December, one thousand eight hundred and seventy, and of all coupons and bonds for interest thereon, and also by all the holders of the second mortgage bonds of the company secured by the said recited indenture of the fifteenth day of March, one thousand eight hundred and seventy-five, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error were, and always had been, citizens of the State of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the city of New York, where the exchanges were made, in December, 1878. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the first of July, 1875, and since, though demanded. The company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The company pleaded the scheme of arrangement as a defence, and at the trial tendered the new bonds in exchange for the

old. The Circuit Court decided that the arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

WAITE, C. J.¹ That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose, that is to say, to build, maintain, and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion Parliament. It had no power to borrow money or incur debts except for completing, maintaining, and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, etc. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta v. Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad v. Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf v. Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul v. Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and

¹ Part of the opinion is omitted. — ED.

purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its corporate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was, and had been for a long time, unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors, and shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion Parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognized throughout the Dominion when the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay; for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who

are subject to the jurisdiction, is recognized by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting States from passing laws impairing the obligation of contracts, allows Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries. The fact that the bonds made in Canada were payable in New York is unimportant, except in determining by what law the parties intended their contract should be governed; and every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations.

On the whole, we are satisfied that the scheme of arrangement bound the defendants in error, and that these actions cannot be maintained.

HARLAN and FIELD, JJ., dissented.

MORGAN v. NEW ORLEANS, MOBILE, AND TEXAS
RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF LOUISIANA. 1878.

[Reported 2 Woods, 244.]

BILL to obtain the rescission of a certain contract made between the plaintiff and the defendant railroad. Morgan and the railroad company owned various transportation lines and charters for building railroads between Mobile, New Orleans, and Houston. To compose their differences they made an agreement by which Morgan agreed to convey to the corporation his transportation line (steamers, wharves, and railroads) between Mobile and New Orleans, and his rights in a partly constructed railroad in Louisiana, and to subscribe a certain amount toward the stock of the railroad company. The company agreed to convey to Morgan a line of railroad in New Orleans, and to complete the unfinished line of railroad conveyed to it by Morgan within a certain time. Arrangements were also made for a division of the receipts between the parties.

This agreement was made and executed in New York, and in accordance with its terms the conveyances of transportation lines were made, and Morgan paid in the amount of his subscription to the stock of the railroad company. The defendant corporation did not complete the construction of the Louisiana railroad within the agreed time.

The prayer for rescission was based upon Articles 2045, 2046 of the Civil Code of Louisiana: "The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed;" and such "resolutive condition is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements."¹

BRADLEY, Circuit Justice. . . . The next question is, whether the complainant is entitled to have the contract rescinded on account of nonperformance by the railroad company of their part of it. The demand for rescission on this ground rests upon the peculiar law of the State of Louisiana before referred to. If the contract is to be governed by that law, I should have no hesitation in saying that the complainant is entitled to the relief which he asks. The building of the railroad beyond Brashear City, so as to give the complainant a through connection between his Opelousas road and Texas, was undoubtedly a material consideration with him, amongst the other considerations moving to the contract. The contract was a commutative one. In that respect it fully met the definition of the Louisiana Code, which declares (art. 1768): "Commutative contracts are those in which what is done, given, or promised by one party is considered as equivalent to, or a consideration for, what is done, given, or promised by the other."

It becomes material, therefore, to ascertain whether the contract is to be governed by the law of Louisiana. The general rule is, that a contract is to be governed as to its interpretation, its nature, its obligation, and its performance, or dissolution, by the law of the place where it is made or entered into. In other words, *lex loci contractus est lex contractus*. The first and principal exception to this rule is, that if the contract is made in one State or sovereignty, and is to be performed in another State or sovereignty, it is to be governed by the law of the place of performance, because it will be presumed that the parties had the laws of the latter place in view when they entered into the contract. The rule and the exception have been fully discussed and commented upon by Mr. Justice Story in his Conflict of Laws, and by many other writers on private international law, and it is unnecessary to review those discussions here.

In this case the contract was made in New York by persons who resided there. The railroad company, it is true, was a corporation originally chartered by Alabama, and subsequently capacitated by the laws of Louisiana and Texas to exercise all its faculties in those States; but its directors and officers mostly resided in New York and other Northern States, and its principal office was in New York, and the meetings of its directors were usually held there. In this case, all the negotiations which led to the contract were carried on in New York, and the contract itself was concluded and executed there.

¹ This short statement of facts is substituted for that contained in the opinion. Part only of the opinion is given. — Ed.

But, on the other hand, the interests, operations, and property, which formed the principal object of the contract, were located in the Southern States bordering on the Gulf of Mexico, to wit: Alabama, Mississippi, Louisiana, and Texas, and largely in the State of Louisiana. The contract was made with reference to these interests, operations, and property; but its direct object, that is, the things stipulated and agreed to be done and performed, were to be, or might be in part, done and performed in New York as well as in the States referred to. This will appear when we look at the contract a little more particularly.

It is altogether a personal contract, providing for the doing of certain acts on the one side, and on the other. Its object was a settlement of controversies, and a discontinuance of business opposition between the parties. It is evident that many of the acts stipulated to be done could be, and, in fact, were done in the city of New York. There Morgan executed and delivered to the company the various deeds and transfers of property which he had agreed to do; the conveyances of the property in Mobile, the bills of sale of the steamers, the transfer of Pontchartrain Railroad Company stock, the conveyance of the railroad rights north and west of Brashear City. There he made his stipulated subscription to the securities of the railroad company. There the company delivered to him the said securities, namely, the bonds and certificates of stock. But the discontinuance of the steamboat business between Mobile and New Orleans, and the delivery of the property consequent upon the said conveyances, were done in Alabama and Louisiana; and the building and completion of the railroad beyond Brashear City were necessarily to be done in the latter State.

Now, by what law is such a contract to be governed, where it is executed in one State, and is partially to be performed in that State, and partially in other States?

I have no difficulty in saying that the conveyances and transfers to be made in pursuance of the contract were to be made in conformity with the laws of the States respectively in which the property, when consisting of realty, or subject to local law, was situated. And such conveyances and transfers, when executed, would be governed by the *lex rei sitæ*. But that does not answer the question as to what law the principal contract is to be governed by. In Louisiana, nonperformance of a material stipulation renders the whole contract liable to be dissolved. But no one would apply that rule of Louisiana law to a contract not subject to its dominion, even though the breach should occur in Louisiana. The fact, therefore, that one of the acts to be performed in this case — the construction of the railroad — was to be performed in Louisiana, will not help to resolve the question, unless we can affirm that the entire contract is to be governed by Louisiana law. Does the fact, that a portion of the contract must necessarily be performed in Louisiana, subject it to that condition? If that does, then the like fact that a portion of the contract is necessarily to be performed in Alabama would subject it to Alabama law, and make it an Alabama contract.

In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption, that where a contract is to be performed in a different jurisdiction, the parties must be intended to have in view the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail. The present case is still stronger; for much of the contract was performable, and actually performed in the place where it was made.

I do not mean to say that where the main and principal part of a contract is to be performed in a State different from that in which it is made, the presumption will not arise that it is made in reference to the laws of such place of performance, even though some minor and incidental parts are required to be performed in still different States. Such may, very possibly, be the result in many instances that may occur. When they happen they will be governed by the force of their own circumstances. But I do not see that I am called upon to apply any such exceptional rule in this case. The building of the railroad in question was a very important consideration, it is true; but the contract embraced many other considerations equally important, that were not necessarily to be performed in Louisiana.

The conclusion, therefore, to which I am forced to come is, that the principal contract, made on the 12th of December, 1871, between the complainant and the New Orleans, Mobile, and Texas Railroad Company, was a New York contract, governed, as to its nature and obligation, by the laws and jurisprudence of the State of New York; and as by these laws and jurisprudence, so far as appears, no such dissolving consequence follows from a nonperformance of part of the contract, as is claimed in this case, the claim is untenable, and the relief must be refused.

As no relief can be granted on either of the grounds laid in the bill of complaint, the same must be dismissed with costs.

GREENWALD v. KASTER.

SUPREME COURT OF PENNSYLVANIA. 1878.

[Reported 86 Pennsylvania, 45.]

TRUNKY, J.¹ Lazarus H. Kaster and Joseph Eckhouse, late partners, doing business in the State of Indiana, contracted a debt for goods, purchased of F. Greenwald & Co., in Philadelphia. In the action brought for recovery of that debt, judgment was taken against Kaster for want of appearance. The summons was returned *nil*

¹ Part of the opinion only is given. — Ed.

habet as to Eckhouse. Afterwards suit was brought against Eckhouse in Indiana. The plaintiffs, by their attorneys in fact, on the 4th February, 1875, in consideration of \$700 paid by Eckhouse, released all rights of action against him, and surrendered all claims on account of indebtedness of him, or of the firm of Kaster & Eckhouse, reserving all rights, claims, and liens against said Kaster by reason of their judgment against him in the District Court of Philadelphia, for the sum of \$4,547.98. Upon Kaster's application an issue was ordered to determine the question whether that release operated as a satisfaction of the judgment. At the trial of the issue the learned judge instructed the jury to find for the defendant, for the reason that a release to Joseph Eckhouse, the defendant's partner, executed in Indiana, is a release of both. This direction is assigned for error, and is the only assignment that requires consideration. . . .

The debt was contracted and judgment thereon obtained in Pennsylvania. By the law of this State the plaintiffs could compromise with and discharge Eckhouse from his proportion of the debt, which would be deemed as payment to them of such proportion, without prejudice to their right to recover the other portion from Kaster, and without prejudice to his right for contribution against Eckhouse. As to the extent of contribution, on settlement between Kaster and Eckhouse, we say nothing. No act has been done to defeat the right. The judgment fixed Kaster for the whole indebtedness. The plaintiffs are considered as having received half of it from his former partner, and, in equity, have no claim for more than half the judgment. When Kaster comes and demands discharge from the whole, upon averment that he himself has paid no part of it, but that, for a small sum, they released Eckhouse, expressly reserving their rights against him on the judgment, he makes an unconscionable claim, which should not be granted, except in obedience to positive law. No law requires courts to open their judgments to such end. Had the plaintiffs entered credit for a moiety of the judgment, there would have been no reason for an issue.

The jury should have been instructed to find for the plaintiffs, for one half the amount of the judgment.

Judgment reversed, and venire de novo awarded.

TENANT v. TENANT.

SUPREME COURT OF PENNSYLVANIA. 1885.

[Reported 110 Pennsylvania, 478.]

GREEN, J.¹ The contract in suit in this case was in form a promissory note under seal for the payment of \$180.52, dated October 26,

¹ Part of the opinion only is given. — Ed.

1869, payable at nine months from date. No place of payment is designated in the instrument, but it was given to A. W. Tenant, administrator, etc., of William Tenant, deceased, who was a resident of West Virginia at the time of his death, and the administrator was and is, also, a resident of the same State. The note was given in payment of certain articles purchased at administrator's sale held in West Virginia soon after the intestate's death, and was delivered to the payee in that State. Two sureties joined in the note, one of whom lived in West Virginia and the other in Pennsylvania, and it is against these the present suit is brought. Of course, the note being payable at the residence of the payee and having been delivered there, for goods sold there, must be deemed and taken to be a West Virginia contract. This contract was made, and was to be performed, in that State, and hence the law of that State must govern in determining its validity, obligation, and construction. The only question in the case is, whether the defence set up by the sureties must be determined by the law of West Virginia or the law of Pennsylvania. The defence is that the sureties gave notice to the creditor that he must proceed against the principal for the collection of the note or they would no longer be responsible. By the law of West Virginia such a notice, to be effective, must be in writing. In this case it was verbal only, and therefore if judged by the law of West Virginia it was nugatory. It is argued for the defendants that this right of relief to a surety is a matter relating to the remedy and must therefore be determined by the *lex fori*. But we do not think this position tenable. The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor is an incident of the contract of suretyship. It is a part of the law of that contract, and is therefore a part of the contract itself. It is a qualification of the obligation of the contract, reducing it from a peremptory and absolute obligation to one of a qualified or conditional character. It is true the surety may not exercise his right, and if he does not his obligation remains intact. But on the other hand he may exercise it, and if he does, and the creditor pays no heed to the notice and thereby fails to recover from the principal debtor, the very root of the surety's obligation is reached and destroyed; he is no longer liable; it is as though he had never contracted. Very different is this from the defence of the Statute of Limitations. There the obligation of the contract is not terminated or defeated. Only a right to enforce it by an action in the courts is imperilled. The State simply declares that if her process is used it must be done within certain fixed periods of time, and if not so used the defendant may at his option plead the laches of the plaintiff and receive the benefit of the prohibition. It is in substance a prohibition upon the use of process after a defined period, and this, of course, makes it matter of remedy only. For these reasons we think it quite clear that the right of a surety to discharge his obligation by a disregarded notice to the creditor to pursue the principal debtor, is a matter affecting the obligation of the contract,

and must therefore be determined by the law of the place of the contract. The notice given in this case was verbal only, and therefore of no effect by the law of West Virginia and hence unavailing here.¹ . . .

FEAR v. BARTLETT.

COURT OF APPEALS OF MARYLAND. 1895.

[Reported 81 Maryland, 435.]

ROBINSON, C. J.² The plaintiff is the trustee of the Valley Land and Improvement Company, chartered by the State of Virginia, and this is a suit to enforce the payment of the defendant's subscription to the capital stock of the company. The defence is that the defendant was induced to become a subscriber on the faith of certain representations set forth in a prospectus issued by the company; that these representations were false and fraudulent, and that the defendant, as soon as he became or could by reasonable diligence become aware of the fraud, and before the insolvency of the company, repudiated his contract of subscription and so notified the company. . . .

If one is induced to become a subscriber to its capital stock by the fraud of the company and within a reasonable time after the discovery of the fraud, there being no laches on his part in discovering the fraud, repudiates his subscription, and this too before the insolvency of the company, under such circumstances he is, according to the settled law of this country, relieved of all liability on account of his subscription. He is relieved because he has the right to avoid a fraudulent contract, and because he has exercised this right. The subsequent insolvency of the company can upon no principle make him liable on a fraudulent contract which he has thus repudiated. . . .

In dealing with the defendant's subscription, we have treated it as a Virginia contract. The company was chartered by that State, with its office and place of business in that State, and although the subscription was made in this State, the contract was to be performed in Virginia. And this being so, the rights and liabilities of the parties under it are to be determined by the law of that State. And what we have said as to the right of the defendant to repudiate his subscription on the ground that it was procured through the fraud of the company, is strictly in accord with decision of the Court of Appeals of that State in *Weisiger and others v. Richmond Ice Machine Company*, 90 Va. 795.

Judgment reversed and new trial awarded.

¹ See *Howard v. Fletcher*, 59 N. H. 151. — Ed.

² Part of the opinion only is given. — Ed.

MUTUAL LIFE INSURANCE COMPANY OF NEW
YORK *v.* COHEN.

SUPREME COURT OF THE UNITED STATES. 1900.

[*Reported 179 United States, 262.*]

BREWER, J.¹ . . . The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that State. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 232. In that State, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the State by which the insurance company was chartered and in which it had its principal office, by section 1 of chapter 321 of 1877 had enacted:—

“SECT. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided.”

The provision referred to and which is stated at length in the succeeding part of the section is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

The question, therefore, is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the State. Proceeding on the accepted principle that a State may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the State. Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the

¹ Part of the opinion only is given. — Ed.

legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other States to control insurance contracts made within their limits. Can it be that the State of New York, aware of the fact that other States and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those States and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws, 1876, chap. 341, § 1; the statute now under consideration, Laws, 1877; Laws, 1892, chap. 690, § 92; Laws, 1897, chap. 218, § 92. The varying provisions of these statutes, directed in terms, not to local companies but to companies doing business in the State of New York, strengthen the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State.

Again, the terms of the act itself tend in the same direction. It provides for a 30-day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value.

Further, by section 2 the statute provides that an affidavit by one authorized to mail the notice shall be "presumptive evidence" of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every State and nation of the world?

These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be, and is, in fact, applicable only to business transacted within that State.

It is not doubted that a contract by an insurance company of New

York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said State;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured; and a stipulation that it shall be controlled by the charter and the laws of the State is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York. . . .

We conclude, therefore, that the statute of the State of New York does not under the circumstances presented control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited.

McKENNA, J., dissented.

SECTION IX.

SPECIAL FORMS OF OBLIGATION.

(A) MERCANTILE INSTRUMENTS.

ORY v. WINTER.

SUPREME COURT OF LOUISIANA. 1826.

[Reported 4 Martin, New Series, 277.]

PORTER, J.,¹ delivered the opinion of the court. This case was heard last June, and judgment pronounced at that term. Doubting the correctness of our former judgment, we granted a rehearing, and the case has been argued again, and has received all the elucidation of which we believe it is susceptible.

The action was instituted on a promissory note made at Natchez, payable to one Lloyd Gilbert, and by him indorsed to the plaintiff and appellee.

It is shown by a statute of the State of Mississippi, that the maker of a note, in that State, may set up any equitable defence against a *bona fide* indorsee which he could offer against the payee. Laws of Mississippi, 464.

The first question in the cause is, by what laws should this contract be governed? The plaintiff contends, that as the note was indorsed in this State, and to a citizen of it, that the rights of the parties must be ascertained by the laws of Louisiana.

We are clearly of opinion it should not. That the validity of a contract must be ascertained in relation to the laws of the country where it is made, is a rule as well known, and of as frequent application in this court, as any other we act under. We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another State which can take the case out of the general principle. The argument which attempts to do so takes for granted the note was negotiable, in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one State claiming rights in opposition to those set up by a third party, under a contract made in pursuance to the laws of another country. It is a demand made under an agreement entered into in a foreign State, and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens.²

¹ Part of the opinion is omitted. — Ed.

² All questions as to the validity and the nature of a mercantile obligation are to be determined by the law of the place where the obligation came into being. Thus

LEBEL v. TUCKER.

QUEEN'S BENCH. 1867.

[*Reported Law Reports, 3 Queen's Bench, 77.*]

LUSH, J.¹ The action is on a bill drawn, accepted, and payable in England, and which is therefore an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel; it existed before, and is well established by the decision in *Trimbey v. Vignier*, 1 Bing.

capacity is governed by the law of the place of entering into the obligation. *Benton v. Bank*, 45 Neb. 850, 64 N. W. 227; 14 Clunet, 638 (Germany, 16 Oct. '85). See, however, 4 Clunet, 71 (Austria, 23 Dec. '75), domicile of the party to be bound; 26 Clunet, 177 (Austria, 27 April, '98), capacity of acceptor by place of drawing.

Whether sufficient consideration has passed is to be governed by the law of the place of obligation: as against the drawer, by the place of drawing: *Wood v. Gibbs*, 35 Miss. 559; as against the acceptor, by the place of acceptance: *Webster v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482; *Pasic. Belge*, '93, 2, 39 (Liège, 16 July, '92); as against the indorser, by the place of indorsement: *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103; *Staples v. Nott*, 129 N. Y. 403.

The form of the obligation is governed by the law of the place of making; as whether commercial paper must be expressed as for "value received." *Stix v. Matthews*, 63 Mo. 371; *Sirey*, '57, 1, 586 (Fr. Cass. 18 Aug. '56). But see *Emanuel v. White*, 34 Miss. 56 (by law of place of payment). So whether the addition of a clause giving attorneys' fees deprives a bill of its negotiable character depends on the law of the place of making. *Howenstein v. Barnes*, 5 Dill. 482.

The nature of the liability created is governed by the law of the place of creating the obligation. Thus whether an "anomalous indorser" is a joint maker is determined by the law of the place of indorsement. *Phipps v. Harding*, 70 Fed. 468. Whether an indorser is liable personally to the indorsee is determined by the law of the place of indorsement. *Hyatt v. Bank*, 8 Bush, 193; *Nichols v. Porter*, 2 W. Va. 13; 16 Clunet, 735 (Cass. Florence, 16 Jan. '88). Whether an acceptor is liable to the drawer is determined by the law of the place of acceptance, 24 Clunet, 387 (Colmar, 11 Jan. '95). Whether a note is negotiable, so that payment to the payee or his creditor before notice of indorsement would not discharge the maker, is determined by the law of the place of making. *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Warren v. Copelin*, 4 Met. 594; *Dow v. Rowell*, 12 N. H. 49. It has, however, been intimated that this question is governed by the law of the place of payment. *Brabston v. Gibson*, 9 How. 263 (*semble*); *Strawberry Point Bk. v. Lee*, 117 Mich. 122, 75 N. W. 444 (*semble*). And see *Savings Bank v. Nat. Bank*, 38 Fed. 800; *Bank v. Hemingray*, 31 Oh. S. 168.

It has been held that whether an indorsement for a pre-existing debt bars equities, as a purchase for value, is to be determined by the law of the place of indorsement. *King v. Doolittle*, 1 Head 77. — Ed.

¹ The concurring opinion of MELLOR, J., is omitted. — Ed.

N. C. 151, viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: he says, "Pay a certain sum at a certain date to my order;" the acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is, "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in *Trimbey v. Vignier*, 1 Bing. N. C. 151. My Brother *Hayes* is mistaken in supposing that the judgment deals *simpliciter* with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment *TINDAL*, C. J., after saying that the point reserved was, whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France, and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts, by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England, applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only

relates to the mode of instituting and conducting the suit. . . . And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. . . . If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. . . . We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France; probably, the courts of France would hold that the English law governed. All we decide is, that the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

*Judgment for the plaintiffs.*¹

ALCOCK v. SMITH.

COURT OF APPEAL. 1892.

[Reported [1892] 1 *Chancery*, 238.]

LINDLEY, L. J.² The question in this case is which of two persons is entitled to a sum of £350, being the produce of a certain cheque for £235 and a bill of exchange for £115. It will not be necessary to draw any distinction between the cheque and the bill, and, therefore, I will allude only to the bill.

¹ See *Bradlaugh v. De Rin*, L. R. 5 C. P. 473.

The sufficiency of an indorsement to pass title to a mercantile instrument is to be determined by the law of the place of indorsement. *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382; *Woods v. Ridley*, 11 Humph. 194; 5 Clunet, 51 (Palermo, 7 July, '77); 12 Clunet, 79 (Paris, 8 Dec. '81); 21 Clunet, 586; (Liège, 26 July, '93). *Contra* (by the law of the place of payment), *Everett v. Vendryes*, 19 N. Y. 436; 20 Clunet, 194 (Germ. 5 Nov. '89). — Ed.

² Concurring opinions of LOPES and KAY, L.JJ., are omitted. — Ed.

The bill was drawn in the English language in England by an Englishman named Ellison on Messrs. Smith, Payne, & Smith, of London, bankers, and was made payable in London. It was drawn to the order of Messrs. Andresen & Co., who were merchants in Christiania, in Norway. The history of the bill is this: It was indorsed by Messrs. Andresen to a Mr. Meyer, and it was on the 11th of March indorsed by Mr. Meyer in blank, and was given by him to a gentleman of the name of Schiender for Arthur Alcock and the firm of J. F. Alcock & Co., which last firm consisted of John Forster Alcock and Arthur Alcock. It is important to bear in mind that it was a bill which, as it then stood with Meyer's indorsement upon it, was a negotiable instrument transferable to bearer. The Alcocks then held it by their agent Schiender. In that state of things, under a judgment obtained in Norway against Mr. John Forster Alcock, one of the judicial officers or ministerial officers in Norway (a person whom I will allude to for the sake of shortness as a sheriff) seized in execution, according to the law of Norway, this bill indorsed as it was, and sold it in accordance with the law of Norway. It was bought by a person of the name of Schjöldt for Meyer, and, on the 9th of May, Meyer sold it to Köpmansbank. It did not require any further indorsement, because it was sold as a negotiable instrument payable to bearer, and was bought by Köpmansbank as a negotiable instrument payable to bearer; and they bought it in the ordinary course of business *bond fide* and for value. At that time the bill was unquestionably overdue. One point which we have to consider is, what was the effect of the purchase by Köpmansbank of this bill in its then state and under the circumstances I have mentioned, bearing in mind that it was an overdue bill of exchange? Now, according to Mr. Schiender's evidence, which is not contradicted or disputed, it is plain that, under the law of Norway, the judicial sale of that negotiable instrument "transferable to bearer" (a circumstance to which I attach great importance) conferred a good title upon the purchaser. It is also proved by the other evidence that, according to the law of Norway, a person who *bond fide* purchases for value a bill of exchange, which bill is overdue, is not affected in regard to title as he would be affected by the law of England.

That being the state of things, and Köpmansbank having become the holders of that bill for value, I proceed to consider whether they are or are not entitled to recover and hold for themselves the money represented by the bill. It has been argued by Mr. Haldane and Mr. Farwell, that inasmuch as this was an inland bill transferred to them when it was overdue, although it was taken *bond fide*, they took it subject to all equities affecting the bill, and they say that Köpmansbank could not maintain an action in respect of that bill against the acceptor of it. That argument is based upon the fact that this was an English bill, and upon the combined operation of the Bills of Exchange Act, sect. 72, sub-sect. 2, which I will read presently, sect. 36, sub-sect. 2, and sect. 29, sub-sect. 2. Now, it is impossible in applying those sec-

tions to this bill and to the title of Köpmansbank to ignore the fact that they acquired their title under the judicial sale, and if due effect is given to that, then it seems to me that, even looking at the matter in the narrowest possible point of view, Köpmansbank are entitled to recover this money from the acceptor.

Now, I will go through the sections with reference to the arguments which have been addressed to us. Sect. 72 of the Bills of Exchange Act relates to the conflict of laws, and the first part of it does not apply, but sub-sect. 2 runs thus: "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill"—as this is—"is indorsed in a foreign country"—as this was—"the indorsement shall as regards the payer"—which I read as the acceptor—"be interpreted according to the law of the United Kingdom." Now, this bill was indorsed in such a way, as it appears to me, that the indorsement was effectual whether you interpret according to English law or according to any other law. Then sect. 36, sub-sect. 2, is important, because, treating this as an English bill covered by English law, it is applicable. Sub-sect. 2 says this: "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." That is to say, if you take an overdue bill you take it subject to any defect of title in the person from whom you got it. That gives rise to the question, Was there any defect in title in Meyer, from whom Köpmansbank got it? That must be considered. But Meyer got it under the judicial sale, and there was no defect at all. Now, "defect of title" is a phrase introduced into the Bills of Exchange Act in lieu of the old expression "subject to equities," which is an expression not adopted because the Act applies to Scotland as well as to England, and "subject to equities" is an expression not known to Scotch law. Sect. 29, sub-sect. 2, says "In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." The present case clearly does not come within those words. The only possible words under which it could come would be "or other unlawful means." But the means by which Meyer got the bill were not unlawful; they were lawful according to the law of the place where the transaction took place. Therefore, putting the case in the light most favorable to the appellants, Köpmansbank have a good title to this bill and the money represented by it, treating it as an English bill and applying the provisions of the Bills of Exchange Act, having regard, of course, to what took place in Norway.

Now, if that is so, we have only further to consider whether there are any equitable grounds for depriving those gentlemen of the money to which they have become entitled. The appellants put their case very forcibly in this way, that the judicial sale of the bill was subject to the claim of Arthur Alcock to eight-elevenths of this money; but how can that equity attach to a bill indorsed in blank, and so transferable to bearer? That may be a question between themselves, but it does not affect any person taking the bill. The bill is taken simply with notice that the sheriff, as I have called him, was selling. Now, what did the sheriff sell? He did not sell the bit of paper merely, but he sold the bill—that is to say, he sold the benefit of the contract represented by the paper which he handed over. What was that benefit, and what was the contract? The contract on the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of England. I agree. But we must not ignore what took place in Norway. The argument on the part of the appellants is that we ought to shut our eyes to the mode and circumstances under which Meyer got the bill. If the mode and circumstances under which he got it were such as to give him a title in Norway, not only to the bill but to the benefit of the contract, then Köpmansbank are the lawful holders by the law of England, and there would be no defence to an action. The equity is displaced by the very same reasoning. You cannot enforce the equity as against the *bonâ fide* holder of a bill which is transferable to bearer, and of which he is the lawful holder.

With reference to the authorities, I do not think I need say much. The strength of the plaintiffs' case is that this was an overdue bill with notice of the defect in title. The answer is that there is no defect of title, and therefore there is nothing for the holders to have notice of. The cases of *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77; *Lee v. Abdy*, 17 Q. B. D. 309; and *Bradlaugh v. De Rin*, Law Rep. 3 C. P. 538; *Ibid.* 5 C. P. 473, do not appear to me to touch this case at all. We are asked to say on the authority of those cases that the court is to ignore a title which is good according to the law of the country where the bill has been sold. Those cases lay down no such principle. The difficulty of the appellants in this case arises from the fact that Alcocks, though they had been the lawful holders of the bill, had ceased to be so by the law of Norway. *Lebel v. Tucker*, Law. Rep. 3 Q. B. 77, does not touch that, nor do any of the cases which have been referred to come near it.

On those short grounds, treating this to the fullest extent as a bill overdue when bought, and assuming that Köpmansbank are supposed to have had notice of any defect of title, the fact that there was no defect of title is a complete answer both at law and in equity. Therefore, I am of opinion that the learned judge in the court below in this case was quite right, and that this appeal must be dismissed with costs.

AYMAR v. SHELDON.

SUPREME COURT, NEW YORK. 1834.

[Reported 12 Wendell, 439.]

ERROR from the Superior Court of the city of New York. Sheldon and others, as indorsees, brought a suit against B. & I. Q. Aymar, as indorsers of a bill of exchange, bearing date 4th June, 1830, drawn by V. Cassaigne & Co. St. Pierre, at Martinique, on L'Hôtelier Frères, at Bordeaux, in France, for 4,000 francs, payable at twenty-four days' sight, to the order of B. Aymar & Co., the name of the firm of B. & I. Q. Aymar. The plaintiffs set forth the indorsement of the bill of exchange at the city of New York, where, they averred, that they and the defendants, all being citizens of the United States at the time of the indorsement, respectively dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to L'Hôtelier Frères, at Bordeaux, for acceptance, according to the custom of merchants, and that they refused to accept; whereupon the bill was duly protested for non-acceptance, and notice given to the defendants. The defendant pleaded: 1. Non-assumpsit; 2. That the bill declared on was made and drawn in the island of Martinique, a country then, since, and now, under the dominion and government of the king of France, by persons there dwelling subjects of the king of France; and that the bill, according to its tenor, was payable at Paris, in the kingdom of France, by persons then and still residing and dwelling at Bordeaux, in the kingdom of France, subjects of the king of France, to wit; on, etc. at, etc.; that the island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the drawers and drawees were subject and governed by the laws of the kingdom of France, there and then, and still existing and in force, to wit on, etc. at, etc.; that by the laws of France, then and still at the several places in the plea mentioned, existing and in force, it is established, enacted, and provided, in relation to bills of exchange drawn and payable in the countries subject to the laws of France, among other things, in manner and form following, namely: The drawer and indorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. Code de Commerce, 119. The refusal of acceptance is evidenced by an act denominated protest for non-acceptance, *id.* 120. On notice of the protest for non-acceptance, the indorsers and drawer are respectively bound to give security, to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or by the date of the protest for non-acceptance. The holder is not

excused the protest for non-payment by the protest for non-acceptance. After the expiration of the above periods (certain periods specified in the code, and which, in the case of a bill drawn in the West Indies on France, is one year) for the presentment of bills at sight, or one or more days after sight, for protest of non-payment, the holder of the bill loses all his claim against the indorsers, etc. setting forth, besides the above, a variety of other provisions of the French code, relative to bills of exchange, and then averring, that although at the time of the commencement of the action of the plaintiffs, twenty-four days after sight of the bill of exchange declared on had elapsed, from the day when the same was alleged to have been protested for non-acceptance, yet no protest of the said bill for non-payment had been made, concluding with a verification and prayer of judgment. 3. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for non-acceptance, as alleged in the declaration, they were ready and willing to give security; and offered to the plaintiffs to give security, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, etc. at, etc., concluding as in last plea. To the second plea the plaintiffs demurred, and took issue upon the third, denying that the defendants did offer security, etc.

The Superior Court, on the argument of the demurrer, adjudged the second plea to be bad; after which the issues of fact were tried. The jury found for the plaintiffs, on the plea of non-assumpsit, and assessed their damages at \$895.52, and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

By the court, NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than

that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect considered as a new drawer. Chitty on Bills, 142; 3 East, 482; 2 Burr. 674, 5; 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*. 6 Cranch, 21; 2 Kent's Com. 460; 4 Johns. R. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In *Hix v. Brown*, 12 Johns. R. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the bill in question. He pleaded his discharge here, and the court say, "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of *Peters v. Brown*, 5 East, 124, contains a similar principle. See also 3 Mass. R. 81; *Van Raugh v. Van Arsdaln*, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, *n*.

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the indorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the indorser for the default of the drawee in this respect. 3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the indorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps

necessary according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

*Judgment affirmed.*¹

ROUQUETTE v. OVERMANN.

QUEEN'S BENCH. 1875.

[*Reported Law Reports*, 10 *Queen's Bench*, 525.]

THIS was an action brought by the plaintiff as indorsee and holder against the defendants as drawers and indorsers of a bill of exchange. The bill is as follows :

"Manchester, 28th June, 1870. For £345 15s. 2d. sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345 15s. 2d. sterling, at the exchange as per indorsement for value received, which place to account as advised.

OVERMANN & SCHOU.

"To Messrs. Magalhaes Frères, 5 Rue Martel, Paris."

Defendants indorsed the bill to plaintiff in England. The bill was duly presented to the drawees in Paris and accepted by them. Before the time for payment, war having broken out between France and Germany, payment of this and similar instruments was postponed from time to time by the legislative authority in France, and demand of payment before the time fixed forbidden, until a delay of eleven months was finally provided. On the 5th of September, the day on which the extended term of grace expired, the bill was presented for

¹ It is held generally in this country that the nature of the notice required to bind a drawer or indorser to a holder depends upon the law of the place of drawing or indorsement. *Thorp v. Craig*, 10 Ia. 461; *Huse v. Hamblin*, 29 Ia. 501; *Snow v. Perkins*, 2 Mich. 238; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *Raymond v. Holmes*, 11 Tex. 54. *Contra* (by the law of the place of payment of the instrument), *Rothschild v. Currie*, 1 Q. B. 43; *Wooley v. Lyon*, 117 Ill. 244, 6 N. E. 885; *Chew v. Read*, 11 Sm. & M. 182; 3 Clunet, 361 (Paris, 22 March, '75).

So, it has been held, that whether a provision of the bill has the effect of a waiver of notice by the indorsee is determined by the law of the place of making and indorsement. *Dunnigan v. Stevens*, 122 Ill. 396, 13 N. E. 51.

Whether prior judgment against the maker is required before suing the indorser is likewise governed by the law of the place of indorsement. *Williams v. Wade*, 1 Met. 82 (*semble*). And what diligence is necessary to bind drawer or indorser is governed by the law of the place of drawing or indorsement. *Hunt v. Standart*, 15 Ind. 33; *Warner v. Citizens' Bank*, 6 S. D. 152, 60 N. W. 746; *Sirey*, '96, 4, 7 (Cass. Florence, 8 Apr. '95). *Contra* (by law of place of payment), 15 Clunet, 554 (Palermo, 13 Dec. '86).

The form of protest is regulated by the law of the place of protest, i. e., of payment. *Todd v. Neal*, 49 Ala. 266; *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; 21 Clunet, 370 (Brussels, 14 June, '93). — ED.

payment, which was refused. The bill was duly protested, according to the French law, on the 6th of September, and notice of dishonor and of the protest duly sent to the defendants. The defendants refused payment.¹

COCKBURN, C. J. The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonor on its non-payment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonor on non-payment at the regular time, — it being contended that whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and if it was not then paid, to give notice of its dishonor — the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonor will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favor of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion. Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees *inter se*. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

¹ This statement of facts is substituted for that of the Chief Justice. Part of the opinion is omitted. — ED.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and payment having been refused, an action had been brought in a French court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance, — a rule which is strikingly illustrated by the familiar but pertinent example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or *vice versa*, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by *ex post facto* legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonor should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange

makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser before, according to the law applicable to the acceptor, the bill became due; or, the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorseees *inter se* shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by *ex post facto* legislation in the foreign country. A strong argument *ab inconvenienti* may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. That to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered, that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obligations of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill, falling due on a day appointed to be kept as a holiday, should be payable a day after, — as was done by the Act of 34 & 35 Vict. c. 17, — the period at which the liability of the indorser on non-payment by the acceptor would arise, would be *pro tanto* delayed.

To the second argument it may be answered, that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonor in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, *à fortiori*, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonor cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it, the acceptors might, possibly, have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might, possibly, the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has

accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonored, or that notice of its dishonor could be effectually given so as to charge the indorser. Another ground for holding that presentment and notice of dishonor at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at the appointed time and notice of dishonor immediately on payment being refused. The reason given is, that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced. . . .

On these grounds we are of opinion that the presentment for payment was made, and the notice of dishonor given, at the right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

*Judgment for the plaintiff.*¹

¹ The time for presentment for payment is governed by the law of the place of payment. *Pierce v. Insdeth*, 106 U. S. 546; *Pryor v. Wright*, 14 Ark. 189; *Snow v. Perkins*, 2 Mich. 238 (*semble*); *Kentucky Com. Bk. v. Barksdale*, 36 Mo. 563; *Walsh v. Dart*, 12 Wis. 635; 1 Clunet, 100 (*Austrian Consular Ct.*, 15 April, '72); 1 Clunet, 149 (*Sweden*, 14 May, '73); 1 Clunet, 209 (*Brussels*, 29 Apr. '72); 21 Clunet, 370 (*Brussels*, 14 June, '93); 24 Clunet, 827 (*Germ.* 11 Dec. '95). *Contra*, 1 Clunet, 185 (*R. O. H. G.* 21 Feb. '71). — Ed.

BOWEN v. NEWELL.

COURT OF APPEALS, NEW YORK. 1855.

[Reported 13 *New York*, 290.]

JOHNSON, J.¹ By the law of the State of Connecticut, where this paper was to be paid, it was payable upon the day when, by its tenor, it became due, without grace. What the law of a foreign country is, can only be determined upon evidence; it is a question of fact. The Superior Court has decided upon evidence derived from the best sources, and of the most unquestionable character, that such is the law of Connecticut, and we see no ground to doubt the correctness of that conclusion. Nor is there any more room to doubt that by the law of this State, the law of Connecticut is to control and govern, in respect to the allowance of grace upon a bill of exchange or check drawn upon and payable at a Bank in that State. (Story, *Conf. of Laws*, 2d ed., § 361.)

The judgment should be affirmed.

*Judgment accordingly.*²

GIBBS v. SEWASTIANOFF.

TRIBUNAL OF COMMERCE, ST. PETERSBURG. 1875.

[Reported 5 *Clunet*, 297.]

WILKINSON & Co., at Ekatherineburg, drew upon Holland Jacques & Co., at London, several bills of exchange, payable on May 20, 1874, to the order of John Dixon Gibbs. The latter transferred it by indorsement, at St. Petersburg, to Sewastianoff. The bills were neither accepted nor paid, and were therefore protested at London on April 16 and May 30, 1874. Gibbs, being called upon as indorser by Sewastianoff to pay the bills, refused to do so in accordance with the Russian law, because the protest for non-payment, dated May 30, was too late and was therefore null. Sewastianoff urged that according to the English law, which alone in this case should be the basis of the judgment, the protest for non-acceptance sufficed to give the holder the right of recourse against the indorser.

THE TRIBUNAL. The consequences and the regularity of protests and signatures with reference to bills of exchange must be judged

¹ Part of the opinion only is given. — Ed.

² The allowance of days of grace is regulated by the law of the place of payment. *Washington Bank v. Triplett*, 1 Pet. 25; *Skelton v. Dustin*, 92 Ill. 49; *Brown v. Jones*, 125 Ind. 375; *Thorp v. Craig*, 10 La. 461; *Bank of Orange v. Colby*, 12 N. H. 520; *Pawcatuck Nat. Bank v. Barber*, 22 R. I. 73, 46 Atl. 1095; *Blodgett v. Durgin*, 32 Vt. 361. — Ed.

according to the law of the country where the protests were made or the signatures given. Applying this rule to the case in suit, the regularity of the protest for non-payment should be determined by the English law, the responsibility of the indorser by the Russian law. According to the English law the protest for non-payment of a bill never accepted should be made three days after maturity; the bills in question having been protested the tenth day after maturity, the protest is too late, and consequently the bills must be regarded as not protested. According to the Russian law, the responsibility of the indorser is conditioned on protest for non-acceptance and also for non-payment, and Gibbs, by reason of the nullity of protest for non-payment, is therefore not responsible.

ROTTA v. EHRT.

REICHSOBERHANDELSGERICHT. 1876.

[Reported 21 *Entscheidungen des R. O. H. G.*, 150.]

THE COURT.¹ The bill on which suit is brought is for 885 lire, dated Leipzig, September 14, 1874, and was drawn by the defendant to his own order upon A. L. in Rome at three months from date, that is, December 14, 1874. This was accepted by the drawee in this form: "I accept for 680 lire for the last of March, 1875." This acceptance was therefore limited not only with respect to the amount, but also in relation to the time of payment; and with respect to the latter restriction the bill, if we are to apply the rules of the German mercantile law, is to be regarded as between the holder and prior parties as if acceptance had been absolutely refused. . . .

By the fundamental principles of the German mercantile law there is therefore no doubt that action on the bill, which was protested for the first time on the first of April, 1875, for non-payment, is barred as against the defendant. But whether the provisions of the Commercial Code for the kingdom of Italy of June 25, 1865 (Art. 211, 247, 248) would lead to another result need not be considered; since the liability of the defendant, who drew and indorsed the bill in Germany, upon it is to be determined by the German law of commercial paper, though the drawee lived abroad. See 1 *Entsch.* 292; 11 *ib.* 219; 1 *Samml. Wechselrechtl. Entsch.* 88; 2 *ib.* 82; Goldschmidt in 17 *Zeitschr. f. H. R.* 306. This applies as well to the interpretation and limitations of the right of recourse as to the requisites on which it is conditioned; and therefore the domestic law is applicable to a solution of the question whether presentment of the bill for payment and notice of protest is necessary to preserve the right of recourse and whether these trans-

¹ Part of the opinion is omitted. — Ed.

actions must take place at the time stated in the bill or may be postponed to a later period by the drawee in his acceptance. See Thöl, W. O. p. 84; Hartmann, *Das Deutsche Wechselrecht*, p. 65; 19 *Entsch.* 203.

It is true that according to Art. 86 of the German Bills of Exchange Act the law of that place has to determine the form of a transaction done in exercise and for the preservation of a right in the instrument. The law of the place of payment, therefore, governs in certain respects the time of presentment and protest; it has to furnish the rule, so far as it has established one, to determine at what hour of the day it is to be presented for payment and protest, what days are to be regarded as holidays, and whether it is entitled to days of grace (1 *Entsch.* 293). But the question whether the time named in the bill is unalterably fixed for the presentment and protest, or a later date named in the acceptance may serve to postpone the time, is concerned not with the form of presentment and protest, but with the performance of substantial conditions for the existence of the right of recourse; and these are to be determined, as has been said, by the law of the place where the defendant drew the bill on which recourse is sought.

BLANZY COAL COMPANY v. DAVILLIER.

COURT OF CASSATION, FRANCE. 1900.

[*Reported Sirey and Journal du Palais*, 1900, 1, 161.]

THE COURT. The assignment of the fund on which a bill of exchange is drawn can be effected, like that of the bill itself, only in accordance with the law of the place where the bill was drawn. The holder of a foreign bill in receiving it took it with its own intrinsic nature, and is thereby submitted to the law of the country where it takes effect by delivery.

In this case Fry and Company, of Cardiff, shipped in December, 1893, four cargoes of coal to the Blanzv Company; and to cover the amount of these shipments they drew on December 28, 1893, on the latter company to the order of Davillier, banker, two bills, payable on January 15, following. These bills were not presented for acceptance, but they were protested at maturity for non-payment. The refusal of the Blanzv company to honor them was based on these reasons: that they were under no agreement with the drawers, then bankrupt, to pay them, and that since the law of England, which was applicable to the instruments in question, gave the payee no right in the fund, they come upon it as against Davillier for the damages due from Fry and Co. for their breach of other contracts for the sale of coal.

The judgment appealed from refused to allow this contention, upon the ground that the rights and duties of a bailee are determined by the law of the place where his obligation arose, and the mandate whence arose the mutual obligations of the drawer and drawee having been made at the domicile of the latter, these obligations are to be governed by the law of that domicile; and consequently recognized in Davillier a right of property in the fund in accordance with the French law. In refusing to apply the foreign law, which alone should govern the relations of the parties, the judgment violated, by falsely applying it, Article 116 of the Commercial Code.¹ *Judgment reversed.*²

SECTION IX.

(B) OBLIGATIONS OF CARRIERS.

LIVERPOOL AND GREAT WESTERN STEAM COMPANY v. PHENIX INSURANCE CO.

SUPREME COURT OF THE UNITED STATES. 1889.

[Reported 129 United States, 397.]

GRAY, J.³ This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the "Montana," one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officer; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods. . . .

The circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship. . . .

¹ "There are funds when at maturity of the bill of exchange the drawee is indebted to the drawer or to the person on whose account it is drawn in an amount at least equal to the amount of the bill." — ED.

² This decision is approved in a learned note to the case by Professor Lyon-Caen, citing many authorities. But see *contra*, *Abt. v. Bank*, 159 Ill. 467, 42 N. E. 856; *Sirey et Jour. du Palais*, '99, 4, 29 (Germany, 23 Mar. '97). — ED.

³ Part of the opinion only is given. — ED.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

The question appears to us to be substantially determined by the judgment of this court in *Railroad Co. v. Lockwood*, 17 Wall. 357. . . .

It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard v. Syracuse Railroad*, 71 N. Y. 180; *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction. and upon a contract made and to be performed within the State. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Myrick v. Michigan Central Railroad*, 107 U. S. 102; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Burgess v. Seligman*, 107 U. S. 20, 33; *Smith v. Alabama*, 124 U. S. 365, 478; *Bucher v. Cheshire Railroad*, 125 U. S. 555, 583. The decisions of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 *Pardessus Droit Commercial*, no. 542; 4 *Goujet & Meyer Dict. Droit Commercial* (2d ed.) *Voiturier*, nos. 1, 81; 2 *Troplong Droit Civil*, nos. 894, 910, 942, and other books cited in *Peninsular & Oriental Co. v. Shand*, 8 Moore P. C. (N. S.) 272, 278, 285, 286; 25 *Laurent Droit Civil Français*, no. 532; *Mellish, L. J.*, in *Cohen v. Southeastern Railway*, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. *The Lottawanna*, 21 Wall. 558; *The Scotland*, 105 U. S. 24, 29, 33; *The Belgenland*, 114 U. S. 355, 369; *The Harrisburg*, 119 U. S. 199; *The Hamburg*, 2 Moore P. C. (n. s.) 289, 319; s. c. *Brown. & Lush*. 253, 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 123, 124; s. c. 6 B. & S. 100, 134, 136; *The Gaetano & Maria*, 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. . . .

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. *The Duero*, L. R. 2 Ad. & Ec. 398; *Taubman v. Pacific Co.*, 26 Law Times (n. s.) 704; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72; *Manchester & c. Railway v. Brown*, 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 234, 256, 258; s. c. 2 Bur. 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. (n. s.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said, "The

general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

It was accordingly held, that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 8 Moore P. C. (N. S.) 278.

Lord Justice Turner observed, that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. *Julien v. Peninsular & Oriental Co.*, imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 *Journal du Palais* (1864), 225.

The case of *Lloyd v. Guibert*, 6 B. & S. 100; s. c. L. R. 1 Q. B. 115, decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London, or Liverpool at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held, that the French law governed the case, and therefore the plaintiff could not recover.

It thus appears that in that case the question of the intent of the

parties was complicated with that of the lawful authority of the master ; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight or the owners, was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 B. & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope v. Nickerson*, 3 Story, 465 ; as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak*, L. R. 2 P. C. 505, 512 ; *The Gætano & Maria*, 7 P. D. 137. See also *The Woodland*, 7 Bened. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the Exchequer Chamber in *Lloyd v. Guibert* was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said : " It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situated in another country, and so forth ; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made ; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123, 6 B. & S. 133.

It was accordingly held, conformably to the judgment in *Peninsular & Oriental Co. v. Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was " manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126 ; 6 B. & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case ; that the law of Hayti had not been mentioned or relied upon in argument ; and that " in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port ;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue.

The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England, by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.¹ . . .

This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading, in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinc-

¹ The learned Judge here examined the following cases: *Chartered Bank of India v. Netherlands S. N. Co.*, 9 Q. B. D. 118, 10 Q. B. D. 521; *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589; *Watts v. Camors*, 115 U. S. 353; *Pope v. Nickerson*, 3 Story, 465; *Morgan v. R. R.*, 2 Woods, 244; *Hale v. N. J. S. N. Co.*, 15 Conn. 538; *Dyke v. Erie Ry.*, 45 N. Y. 113; *McDaniel v. C. & N. W. Ry.*, 24 Ia. 412; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Brown v. C. & A. R. R.*, 83 Pa. 316; *Curtis v. D. & L. R. R.*, 74 N. Y. 116; *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9.—Ed.

tion is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transshipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (8d ed.), Appendix Q.

The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular & Oriental Co. v. Shand*, *Lloyd v. Guibert*, and *Chartered Bank of India v. Netherlands Steam Navigation Co.*, before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall

forfeit to the United States one thousand dollars.' " Act of March 3, 1851, c. 43, § 7; 9 Stat. 636; Rev. Stat. § 4288.

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & Oriental Co. v. Shand* gives some color to the argument. 3 Moore P. C. (n. s.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in the *Brantford City*, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re Missouri Steamship Co.*, 58 Law Times (n. s.) 377.

The present case does not require us to determine what effect the

courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.¹

DIKE v. ERIE RAILWAY.

COURT OF APPEALS, NEW YORK. 1871.

[Reported 45 New York, 113.]

APPEALS from the General Term of the Supreme Court in the Second District in Dike's case, and from the General Term of the Supreme Court in the Sixth District in Floyd's case.

These actions were to recover damages for personal injuries sustained by the plaintiffs while passing over the road of the defendant as passengers, caused by the negligence of the defendant's servants and agents. The defendant is a corporation existing under the laws of the State of New York, owning and operating a railroad for the carriage of freight and passengers between the cities of Buffalo and New York, in that State, and the intermediate places, running its road, *en route* between the termini named, for short distances in the States of Pennsylvania and New Jersey by the permission of those States respectively.

Each of the plaintiffs purchased a ticket and took passage on the defendant's road, on the 14th of April, 1868, from stations in this State to the city of New York, and while in transit from the place of departure to the city of New York, and upon a part of the road in the State of Pennsylvania, sustained the injuries complained of. By an act of the legislature of Pennsylvania, passed April 4, 1868, the recovery in actions then or thereafter instituted against common carriers or railroad corporations for personal injuries is limited to \$3,000. Upon the trials, it was claimed in behalf of the defendant that the rights of recovery of the plaintiffs were controlled by this act. The claim was overruled by the judge, and each of the plaintiffs had verdicts in excess of the limit prescribed by the Pennsylvania statute, Dike for \$35,000, at the King's Circuit, and Floyd for \$15,000 at the Tioga Circuit, and judgments upon such verdicts were affirmed by the

¹ *Acc. Hale v. N. J. S. N. Co.*, 15 Conn. 539; *Pennsylvania Co. v. Fairchild*, 69 Ill. 261; *Brockway v. American Ex. Co.*, 171 Mass. 158, 50 N. E. 626; *Davis v. C. M. & S. P. Ry.*, 93 Wis. 470, 67 N. W. 16; 8 Clunet, 72 (Cass. Belg. 30 Jan. '79); 26 Clunet, 420 (Holland, 17 May '97).

The English cases hold the charter-party or bill of lading to be regulated by the law of the flag. *Peninsular & O. S. N. Co. v. Shand*, 3 Moo. P. C. n. s. 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The August*, [1891] P. 328. If, however, the facts clearly indicate an intention to be bound by another law, the instrument is governed by such law. *The Industrie*, [1894] P. 58. — ED.

Supreme Court at the General Terms. The defendant has appealed to this court.¹

ALLEN, J. The only question to be considered upon this appeal is as to the effect of the Pennsylvania statute, limiting the amount of the recovery in actions of this character. It is conceded that the statutes of one State are not obligatory upon the courts of other States; that they have not *proprio vigore*, the force of law beyond the limits of the State enacting them. But it is sought to bring these actions within the operation and effect of the foreign statute upon the ground that the contracts were made with reference to the laws of that State, and the causes of action arose there.

The generally received rule for the interpretation of contracts is that they are to be construed and interpreted according to the laws of the State in which they are made unless from their terms it is perceived that they were entered into with a view to the laws of some other State. The *lex loci contractus* determines the nature, validity, obligation, and legal effect of the contract, and gives the rule of construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. *Prentiss v. Savage*, 13 Mass. 20; *Medbury v. Hopkins*, 3 Con. 472; *Everett v. Vendryes*, 19 N. Y. 436; *Hoyt v. Thompson's Exr.*, id. 207; *Curtis v. Leavitt*, 15 N. Y., 227. The contracts before us were made in the State of New York, and between citizens of that State. The plaintiffs were actual inhabitants, and the defendant was a corporation existing by the laws of that State. The contracts were for the carriage and conveyance of the plaintiffs over the road of the defendant, between two places in the same State, to wit, from stations on the line of the road, in the western part of the State to the city of New York. The duty and obligation of the defendant, in the performance of the contracts, commenced and ended within the State of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their destination passed through portions of the States of Pennsylvania and New Jersey, by the consent of those States respectively, the parties cannot be presumed to have contracted in view of the laws of those States. The contracts were single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica, or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The

¹ Arguments of counsel are omitted. — Ed.

obligation was created here, and by force of the laws of this State, and force and effect must be given to it, in conformity to the laws of New York (*Carnegie v. Morrison*, 2 Metc. 381, Per Shaw, Ch. J.) The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*. The case of the *Peninsular and Oriental Steam Navigation Co. v. Shand* (3 Moo. P. C. n. s. 272), is somewhat analogous in principle to the case at bar. A passenger, by an English vessel belonging to an English company, from Southampton to Mauritius *via* Alexandria and Suez, sustained a loss of his baggage between Alexandria and Mauritius, and it was held that the contract for the passage was to be interpreted by the law of England, the place where the contract was made. The Supreme Court at Mauritius had held that the contract was governed by the French law in force in Mauritius, and refused to the defendants the benefit of an exemption from liability for loss of property, to which they were entitled by the terms of the contract as interpreted by the laws of England, and the judgment was reversed, upon appeal, by the Privy Council.

Whether the actions are regarded as actions of assumpsit upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of the action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action the liability of the defendant, and the rights of the plaintiffs, are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts, and the obligations for the violation and breach of which an action may be brought are only co-extensive with the contracts made. It follows, that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect, and construction, is subject to the laws of New York. The damages to which a party is entitled upon the breach of a contract, or violation of a duty growing out of a contract, and the rule and measure of damages pertains to the right and not to the remedy. It is matter of substance, and the principal thing sought, and not a mere incident to the remedy for the principal thing. It is conceded that the statutes of Pennsylvania have no intrinsic extraterritorial force, and that they bind only within the jurisdictional limits of the State. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws. In matters of contract, such effect is accorded to statutes of other States, only to carry out the intent of and do justice between the parties, never

to qualify or vary the effect of a contract between parties not citizens of such foreign State, or subject to its laws, and not made in view of the laws of such State. Effect will not be given by the courts of a State to foreign laws in derogation of the contracts, or prejudicial to the rights of citizens. *Liverpool, Brazil, &c. Steam Navigation Company v. Benham*, 2 Law Rep. P. C. Cases; 198; *Hale v. N. J. St. Nav. Co.*, 15 Conn. 539; *Arnott v. Redfern*, 2 Carr. & Payne, 88; *Gale v. Eastman*, 7 Met. 14.

The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts, and are given by the common law, and, therefore, the laws of another State in an action brought here cannot prescribe the measure of damages, or limit the liability of the parties. *Judgment affirmed.*¹

TALBOTT v. MERCHANT'S DESPATCH TRANSPORTATION CO.

SUPREME COURT OF IOWA. 1875.

[Reported 41 Iowa, 247.]

THIS action is brought to recover the value of four cases of boots, delivered by plaintiff's agents to defendant, a common carrier, at Hartford, Conn., to be transported by said defendant to Des Moines, Iowa. The plaintiff alleges the acceptance of the goods, an agreement to carry, and the failure to deliver, and claims the value thereof — \$220.38. The defendant, by answer, admits that it is a common carrier, the receipt of the goods and the failure to deliver, and avers want of knowledge as to value. The defendant also avers that by the express terms of said agreement, the goods were to be transported and delivered in Des Moines, in like order as they were received, damages from fire excepted; and that without any fault or negligence of said defendant, said cases of boots were, at Chicago, Illinois, destroyed by fire (in the great conflagration of October, 1871), while in transit from Hartford to Des Moines. The bill of lading containing the agreement was annexed as an exhibit to the answer, and it shows the receipt of the goods in good order and the marks thereon, and states that said four cases of boots are "to be forwarded in like good order (dangers of navigation, collision, and fire, and loss occasioned by mob, riot, insurrection, or rebellion, and all dangers incident to railroad trans-

¹ In a few cases it is held that a limitation of liability is governed by the law of the place of contracting where the carriage is to be through that and other States, because the contract is entire and the laws of several places of performance cannot be applied. *Ill. Cent. R. R. v. Beebe*, 174 Ill. 13, 50 N. E. 1019; *R. R. v. Exposit. C. Mills*, 81 Ga. 522, 7 S. E. 916. — Ed.

portation excepted), to depot only, he, or they paying freight and charges for the same as below."

The plaintiff demurred to the answer because: 1. It does not allege that plaintiff has assented to the alleged agreement. 2. It does not show that the loss of said goods occurred through any exception mentioned. 3. The agreement stipulated for absolute exemption from liability, even though the loss occurs through the negligence of defendant, and is therefore against public policy, and void.

This demurrer was sustained, and, the defendants electing to stand upon the answer, judgment was rendered for plaintiff for the amount of the claim. The defendant appeals.¹

COLE, J. It is conceded by the respective counsel that the contract as shown by the bill of lading, containing exceptions from liability for loss by fire, was valid and binding in Connecticut. *Lawrence v. N. Y. P. B. R. R. Co.*, 36 Conn. 63; and in Illinois, *I. C. R. R. Co. v. Morrison*, 19 Ill. 24. And that, by Chap. 13, Laws of 11th G. A. of Iowa, it was enacted "that in the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule, or regulation shall exempt such railroad or other company, person, or firm from the full liabilities of a common carrier, which in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property" (see Laws of 1866, p. 121), and that thereby the exceptions in the bill of lading in this case would be inoperative and void in Iowa. The main question, therefore, presented in this case is, whether the contract of affreightment shall be governed by the laws of Connecticut or of Iowa. Respecting the general rule that a contract valid where made is valid everywhere, and that where a contract specifies a place of performance it is to be interpreted by the law of that place, the counsel are also agreed. The question of difficulty in this case is in determining the place of the performance of the contract.

It was held by this court in *McDaniels v. The C. & N. W. Ry. Co.*, 24 Iowa, 412, that a contract of affreightment made in Iowa for the transportation of cattle by railroad from Clinton, Iowa, to Chicago, Illinois, and for their delivery at the latter place, was to be determined by the laws of Iowa, for that the contract was made in Iowa, and was therein partly to be performed. Applying the rule of that case to this, it seems necessarily to follow, that since this contract was made in Connecticut and was there to be partly performed, its validity and effect should be determined by the law of that State. But, without determining that such a rule should be applied to its full extent to every contract or even to this, we here ground our decision of this cause upon the special facts of the case which show that the contract as made was valid in Connecticut, where the contract was made, and in Illinois, where the loss occurred. Whether a different rule would apply if the

¹ Arguments of counsel are omitted. — Ed.

defendants had entered upon the performance of their contract in Iowa and the loss had there occurred, we need not determine.

Our conclusion in this case may be rested upon the general principle, that when there are several possible local laws applicable to the case, that law is to be applied which is most favorable to the contract; or, to state the same rule in other phraseology, when there is a conflict of applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance. See Wharton on Conflict of Laws, § 429, and authorities there cited; *Arnold v. Potter*, 22 Iowa, 194. The answer, by its admission of the execution of the agreement, by fair implication, if not necessarily, admits that it was accepted or assented to by the plaintiff. Such acceptance, without more, would bind him. See *Mulligan v. Ill. Cent. R. R. Co.*, 36 Iowa, 181.

A fair construction of the exception would exempt the defendant from liability from loss, without its negligence, by fire, although such fire did not result from collision. In other words, the exception relates to the loss either by collision or fire, and not alone from loss resulting from "collisions and fire." Our conclusion, therefore, is that the answer presents a sufficient defence and that the court erred in sustaining a demurrer thereto.

*Reversed.*¹

CURTIS v. DELAWARE, LACKAWANNA, AND WESTERN RAILROAD.

COURT OF APPEALS, NEW YORK. 1878.

[*Reported 74 New York, 116.*]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury.

This action was brought to recover for the loss of a trunk and its contents. The court found, in substance, that plaintiff, on the 9th of October, 1875, took passage on defendant's road from Scranton, Pennsylvania, to New York City, leaving his baggage to be brought by his wife; that, on the 16th of October, 1875, plaintiff's wife and infant son took passage at Scranton for New York, with his and their baggage, consisting of personal clothing, all of which was his property; that the baggage was brought safely by defendant to New York, and was there lost through its negligence.

That by a general act of the Legislature of said Commonwealth of Pennsylvania, passed on the 11th day of April, 1867, and at all times since and still in force, it was enacted and declared as follows:—

"Section 1. Each passenger upon a railroad shall have the right to

¹ See *Hazel v. C. M. & S. P. Ry.*, 82 Ia. 477, 48 N. W. 926. — Ed.

have carried in the car or place provided for that purpose, in the train in which he or she may be a passenger, his or her personal clothing, not exceeding, inclusive of the trunk or box in which it may be contained, one hundred pounds in weight, and \$300 in value."

"Section 2. No railroad company shall, under any circumstances, be liable for loss or damage of any baggage or property belonging to any such passenger, beyond the said sum of \$300, unless it shall be proven that the excess in value thereof over that sum was duly declared to the agents of the company at the time of its delivery for transportation, and the sum charged by the railroad company for such transportation over and above passage fare was paid :

"Provided, however, that the said declaration shall not relieve the claimant from proving the actual value of the articles alleged to have been lost or damaged ; but in no event shall there be any recovery beyond the value thus declared."

Further facts appear in the opinion.¹

MILLER, J. The right of a passenger to recover of a railroad corporation damages arising by reason of a loss of baggage, while travelling upon the railroad, is fully established, and according to the laws of this State there can be no question as to the liability of such company for the loss actually sustained, when it fails to fulfil the contract with the traveller, or is chargeable with negligence, by which the damages are caused. The baggage, for which a recovery was had, was delivered to the defendant at Scranton, in the State of Pennsylvania, to be transported to and delivered in the city of New York. The first question which arises upon this appeal is whether the statute of the State of Pennsylvania, passed in 1867, which limits and defines the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, forms a part of the contract between the plaintiff and the defendant, and should be considered as determining the right to recover and the amount of the recovery. I think that the statute cited has no application, and that the rights of the parties must be determined in accordance with the laws of the State of New York, which are applicable to such contracts, as is manifest by referring to the principles which govern contracts of this description. One of the rules applicable to the subject is that the *lex loci contractus* is to govern, unless it appears upon the face of the contract that it was to be performed in some other place, or made with reference to the laws of some other place, and then the rule of interpretation is governed by the law of the place. *Dyke v. Erie Railway Co.*, 45 N. Y. 118 ; *Sherrill v. Hopkins*, 1 Cow. 103. The place of delivery was a material and important part of the contract, and until such delivery, the same was not completed and fulfilled. Upon a failure to deliver the baggage to the plaintiff, in the city of New York, there was a breach of the contract ; and as the final place of performance was in that city, it would seem to follow that, within the rule laid down, the contract was

¹ Arguments of counsel and part of the opinion are omitted. — Ed.

to be governed, at least so far as a delivery is concerned, by the laws of New York. This certainly was to be done in a different place from where the contract was made, and it is a reasonable inference that it was in the contemplation of the parties at the time, and that it was entered into with reference to the laws of the place where it was to be delivered. So also, when it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed. *Sherrill v. Hopkins*, *supra*, p. 108, and authorities there cited: *Thompson v. Ketcham*, 8 Johns. 189; 4 Kent's Com. 459. The place of final performance of the contract being in the city of New York, although the transportation was mostly through other States, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this State, which, it is claimed, sustain the doctrine that the locality where the contract was made, in cases of this character, must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise point now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

BURNETT v. PENNSYLVANIA RAILROAD.

SUPREME COURT OF PENNSYLVANIA. 1896.

[Reported 176 *Pennsylvania*, 45.]

FELL, J. The refusal of the court to charge that "as the contract for transportation was made in New Jersey it will be enforced in this State as in that, and as the defendant was released from responsibility by the free pass the verdict must be for the defendant," raises the only question to be considered. The plaintiff was employed by the defendant as a flagman at Trenton, N. J. He applied for and was granted free transportation for himself, his wife and daughter, to Elmira, N. Y. He received two passes, — one from Trenton to Philadelphia, the terms of which do not appear in evidence; the other, an employee's trip pass from Philadelphia to Elmira, by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa., through the admitted negligence of the defendant's employees.

It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff in consideration of free transportation assumed the risk of accident was valid, and that in that State he could not recover; and it is conceded that in Pennsylvania the decisions are

otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. *Goldey v. Penna. R. R. Co.*, 30 Pa. 242; *Penna. R. R. Co. v. Henderson*, 51 Pa. 315; *Penna. R. R. Co. v. Butler*, 57 Pa. 335; *Buffalo, Pittsburg & Western R. R. Co. v. O'Hara*, 12 W. N. C. 473. The question then is: By the laws of which State is the responsibility of the defendant to be determined?

The defendant is a corporation of the State of Pennsylvania. The injury occurred in the operation of its road in this State. The passes, although issued and delivered in New Jersey, were for transportation from the station in Trenton directly across the Delaware river into this State. The service was to be rendered here; this was the place of performance.

Generally as to its formalities and its interpretation, obligation, and effect, a contract is governed by the laws of the place where it is made, and if it is valid there it is valid everywhere; but when it is made in one State or country to be performed in another State or country its validity and effect are to be determined by the laws of the place of performance. It is to be presumed that parties enter into a contract with reference to the laws of the place of performance, and unless it appears that the intention was otherwise those laws determine the mode of fulfilment and obligation and the measure of liability for its breach. *Daniel on Negotiable Instruments*, 658; *Byles on Bills*, 586; 2 *Kent's Commentaries*, 620; *Wharton on the Conflict of Laws*, § 401; *Story on the Conflict of Laws*, § 280; *Scudder v. Union National Bank*, 91 U. S. 406; *Brown v. C. & A. R. R. Co.*, 83 Pa. 316; *Waverly Bank v. Hall*, 150 Pa. 466. The decision in *Brown v. C. & A. R. R. Co.* (*supra*) seems to be conclusive of this case. In that case a ticket was issued in Philadelphia by a New Jersey corporation operating a railroad in that State, and the plaintiff's trunk was delivered to the defendant in Philadelphia, and it did not appear where it had been lost. The liability being admitted, the question was whether the laws of Pennsylvania limiting the amount of liability applied. It was held that as the service was to be rendered by a New Jersey corporation in New Jersey the laws of the place of performance controlled. It was said in the opinion by SHARSWOOD, J.: "The negligence of which the defendants are presumed to have been guilty was in the course of the exercise of their franchises as a New Jersey corporation, and the extent of their liability is therefore to be determined by the laws of that State."

*The judgment is affirmed.*¹

¹ *Acc. Barter v. Wheeler*, 49 N. H. 9. — Ed.

LORING v. NEPTUNE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1838.

[Reported 20 *Pickering*, 411.]

SHAW, C. J.¹ The general average in the present case was made up and adjusted at Hamburg, the port of destination, at which the several interests liable to contribute were necessarily to be separated from each other. Hamburg therefore was the proper place for the adjustment and payment of this general average. Such general average must necessarily be adjusted according to the laws and usages of the place where the adjustment was made.²

SECTION IX.

(C) OBLIGATIONS QUASI EX CONTRACTU.

BRACKETT v. NORTON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1823.

[Reported 4 *Connecticut*, 517.]

HOSMER, C. J.³ The general question in the case is whether the law implies a contract that the defendant shall pay the plaintiff for the services performed by him. . . . The services of the defendant having been rendered in the State of New York, under a contract made in that State, their laws are the standard by which the case must be determined.⁴ . . .

¹ Part of the opinion only is given. — Ed.

² *Acc.* *Simonds v. White*, 2 B. & C. 805; 1 Clunet, 133 (R. O. H. G. 28 Dec. '72); 5 Clunet, 599 (Rouen, 20 Mar. '78); 8 Clunet, 311 (Holland, 11 Feb. '78); 20 Clunet, 949 (Antwerp, 14 Jan. '92).

If the voyage is completely broken up at an intermediate port of refuge, it has been held that the adjustment of general average should be according to the law there prevailing. *Mavro v. Ins. Co.*, L. R. 10 C. P. 414. In Norway, however, it has been held that it should be adjusted at the port of refuge according to the law of the port of intended destination. 15 Clunet, 151 (25 Mar. '86). If after disaster the cargo is forwarded to destination, general average should then at any rate be computed according to the law of the port of destination. *Nat. Board v. Melchers*, 45 Fed. 643. — Ed.

³ Part of the opinion only is given. — Ed.

⁴ *Acc.* *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456. — Ed.

Appendix to Vol. II

Norton v. Florence Land & Public Works Co.

7 Ch. D. 332 (1897)

Luke Fitzgerald

[1903] 1 Ch. 933

[1904] 1 Ch. 673

1. The first part of the document is a list of the names of the persons who were present at the meeting.

2. The second part of the document is a list of the names of the persons who were absent from the meeting.

3. The third part of the document is a list of the names of the persons who were present at the meeting.

4. The fourth part of the document is a list of the names of the persons who were present at the meeting.

5. The fifth part of the document is a list of the names of the persons who were present at the meeting.

